

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF &
APPENDIX**

74-2104

B P/S

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

NAPOLEON C. GABRIEL, JACOB R. COHEN
and JUNE COHEN, and MICHAEL
MOUMOUSIS,

74-2104

Objectants-Appellants,

-against-

BETTY LEVIN, ALLEGHENY CORPORATION
and ROBERT LeVASSEUR,

Plaintiffs-Appellees,

and

MISSISSIPPI RIVER CORPORATION et al,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO BRIEF FOR GABRIEL AND MOUMOUSIS, APPELLANT'S

GERARD M. CAREY
Attorney for Gabriel and Moumousis, Appellants
617 Third Street
Brooklyn, New York 11215
Telephone number: 768 0009



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74-2104

Appendix of Brief for Gabriel and Moumousis, Appellants

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CIVIL DOCKET 67 CIV 5095
UNITED STATES DISTRICT COURT

67 CIV 5095

Jury demand date:

JUDGE WEINFELD

D. C. Form No. 106 Rev.

TITLE OF CASE (CLASS ACTION)

BETTY LEVIN, on behalf of herself and all other holders of the Class B Common Stock of Missouri Pacific Railroad Company, and on behalf of said corporation & Robert LeVasseur-intervenor-9-30-68
Alleghany Corporation - intervenor plaintiff.
VS

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CRAFT,
T.C. DAVIS and
THOMAS F. MILBANK

Michael *Mounsey*
Plaintiff

ATTORNEYS

For plaintiff:

Orans, Eisen & Volstein (Attys. for Betty L
40-East-40th-Street, NY 10016 1 Rockefeller
Lk 2-4224
Pl. NY 10020

Chambers

Denovan, Leisure, Newton, & Irvine
(for Alleghany Corp) 2-Wall St. NY 10005
to 30 Rockefeller Plaza NY 10020 489-4100
D'Herertz Levy Haudek & Block
(for Robert LeVasseur) 295 Madison Ave.
NYC, NY 10017

Ladouce, Lamb, Leiby & MacRae (Attys for Frank
One Chase Manhattan Plaza, National Bank)
NYC, NY 10001
(212) 541-6262 1-24-73
(Successor voting trustees)

For defendant:

Mississippi River Corp
6 E 15th St. NY 10013 2-2361
SULLIVAN & CROMWELL
48 Wall St NYC

Dewey, Ballantine Bushby, Palmer & Wood
140 Broadway, NYC. 10005 (Mississippi River
NYC, NY

Sullivan & Cromwell
(Attys for Missouri Pacific Railroad Co.
Robert H. Craft,
T.C. Davis and
Thomas F. Milbank

STATISTICAL RECORD

I.S. 5 mailed X

COSTS

Clerk

Marshal

Docket fee

Witness fees

Depositions

Basis of Action: Ordered to
claim and pay dividends on
Class B Stock determined by
Court

Action arose at:

ONLY COPY AVAILABLE

DATE	NAME OR RECEIPT NO.	REC.	DISB.
12-2-68	ORANS	5	-
1-5-68	USTRONS	15	-
5/10/73	CAREY	5	-
5/12/73	USTRONS	5	-
5/16/73	CAREY	5	-
5/15/73	USTRONS	5	-
5/23/74	CAREY	5	-
5/23/74	CAREY	5	-
5/23/74	CAREY	5	-
5/23/74	NEA	5	-
5/23/74	M P Cohen	5	-
5/23/74	MST REAS	5	-
5/23/74	REAS	5	-

67 CIV 5095 BETTY LEVIN, on behalf of herself and all other,etc. VS MISSISSIPPI RIVER CORPORATION, et al

DATE	PROCEEDINGS	Date Order Judgment
Dec. 29-67	Filed complaint and issued summons.	
Jan. 24-68	Filed Order extending time of all defts. (except T.C.Davis) to answer complaint to 2/23/68. Metzner, J.	
Jan 25-68	Filed defts' notice to take deposition of pltff.--sup. issued	
Jan. 29-68	Filed Notice to take Deposition.	
Feb. 29-68	Filed summons & return, service as follows: Mississippi River Corp. by Mr. Craft 1-11-68 Missouri Pacific Rr Co. by T.H. O'Leary 1-4-68 Robert H. Craft personally 1-11-68 Thomas F. Milbank personally 1-9-68	
Feb 1-68	Filed defts' (Mississippi River Corp., et al.) affidvts. & show cause order to transfer, etc.-ret. 2-13-68	
Feb 1-68	Filed defts' (Mississippi, et al.) memorandum in support of their motion	
Feb 7-68	Filed stip. & order adjourning deposition of pltff. sine die.-Cooper, J.	
Feb 9-68	Filed stip. adjourning motion filed 2-1-68 to 2-27-68 (M)	
Feb. 26-68	Filed affidavit of William E. Haudek.	
Feb. 26-68	Filed Affidavit of Sheldon H. Elsen.	
Feb. 26-68	Filed Plaintiff's Brief in opposition to motions to transfer.	
Apr. 3-68	Filed stipulation extending defts. Robert H.Craft and Thomas F.Milbank's time to answer complaint to a date 10 days following determination of a motion now pending. So ordered. Tyler, J.	
Apr. 12-68	Filed Notice of Motion re: Intervene. Ret. 4/23/68, together with affidavit in support thereof.	
Apr. 12-68	Filed Memorandum in support of motion of Alleghany Corp. for leave to intervene.	
Apr. 22-68	Filed stipulation adjourning motion now ret. 4/23/68 to 4/30/68.	
Apr. 26-68	Filed defts' (Mississippi River Corp., et al.) affidvt. in response to motion of Alleghany Corp. for leave to intervene	
Apr. 26-68	Filed defts' (Mississippi River Corp., et al.) memorandum in response to motion of Alleghany Corp. for leave to intervene	
May 20-68	Filed (in court) Affidavit of Granville Whittlesey, Jr. (Reply Affidavit)	
May 30-68	Filed (in court) Reply Memorandum in support of motion by Alleghany Corp. to intervene	
May 27-68	Filed MEMO-END. on motion papers filed 4/12/68. The opposing defendants "do not categorically oppose" the movant's intervention herein, but merely suggest it be deferred for reasons which the Court finds unpersuasive. The motion is granted. So ordered. Metcalf, J.	
May 7-68	Filed complaint of Intervenor Plaintiff Alleghany Corporation.	
May 8-68	Issued additional summons	
May 15-68	Filed additional summons & return, served T.C. Davis personally 5-9-68	
June 5-68	Filed stip. & order extending time of deft. T. C. Davis to answer the complaint to a date ten (10) days following the entry of an order determining the motion by defts. Mississippi River Corp. et al under 28 U.S.C. 1404 and Rules 12(b), 12(d) 23 and 23.1, F.R.C.P. and that the time within all defts. are required to answer the complaint of plaintiff-intervenor is extended to a date ten (10) days following the entry of an order determining the motion by defts. Mississippi River Corp. et al under the same rules.--Motley, J.	
Jun. 28-68	Filed transcript of record of proceedings of 3-19-68 before Herlands, J.	
Jul. 31-68	Filed supplemental affidavit of Edward D. Keane.	
Aug. 15-68	Filed reply memorandum in support of motion to transfer, dismiss or stay the action (filed in court.)	
Aug. 15-68	Filed plaintiff's memorandum in response to reply brief. (filed in court.)	
Aug. 31-68	Filed affidavit of affidavit of plaintiff. J. J. Lee.	

Continued on page 2

JUDGE WEINFELD

D. C. 110 Rev. Ch. D. (Continuation)

D. C. Order
Date Rec'd

DATE	PROCEEDINGS
Jul. 31-68	Filed Opinion #35066--Defendants' motions are hereby denied in all respects. Herlands, J. mn
Aug. 14-68	Filed stip & order extending time of defts to answer the complaint of Pltff, Levin & Alleghany Corp. to 8-26-68---Clerk
Aug. 27-68	Filed Deft Mississippi River Corp ANSWER to Complaint
Aug. 27-68	Filed Deft Mississippi River Corp ANSWER to Pltff-Intervenor
Aug. 27-68	Filed Defts Missouri Pacific RR Co., Robert H Craft T.C. Davis & Thomas Millman ANSWER to complaint
Aug. 27-68	Filed above named defts ANSWER to pltff-intervenor
Aug. 27-68	Filed notice to take deposition of pltff intervenor
Sep. 9-68	Filed plaintiff's affidavit and notice of motion to maintain as class action, ret. 9-17-68
Sep. 9-68	Filed plaintiff's memorandum in support of motion.
Sep. 11-68	Filed affidavit and notice of motion of Robert LeVasseur for leave to intervene, ret. 9-24-68
Sep. 11-68	Filed memorandum in support of motion to intervene.
Sep. 17-68	Filed plaintiff's affidavit consenting to the intervention of Robert LeVasseur.
Sep. 16-68	Filed stip. adjourning motion ret. 9-17-68 to 9-24-68.
Sep. 20-68	Filed affidavit of Michael M. Maney in opposition to motion to intervene.
Sep. 20-68	Filed memorandum of defts. Missouri Pacific Railroad Company et al.
Sep. 21-68	Filed affidavit of John E. Tobin & Sheldon H. Elsen. (filed in court.)
Sep. 21-68	Filed reply memorandum with respect to Rule 23 Motion. (filed in court.)
Sep. 21-68	Filed memo endorsed on motion filed 9-9-68--Motion granted following argument. Settle order on 5 days notice.--Bryan, J.
Sep. 21-68	Filed reply affidavit of William E. Haudek. (filed in court.)
Sep. 21-68	Filed memo endorsed on motion filed 9-11-68--Motion granted following argument. Settle order on 5 days notice.--Bryan, J.
Sep. 30-68	Filed order of intervention that Robert LeVasseur has leave to intervene in this cause, is hereby made a party plaintiff, and may file a complaint in this cause in the same manner and with like effect as if named an original party plaintiff to this cause. The title of this action is hereby amended to read as indicated.--Bryan, J. mn
Oct. 9-68	Filed complaint in intervention of Robert LeVasseur. (no summons issued.)
Oct. 10-68	Filed notice of settlement and order--Ordered that this action is determined to be a class action within the provisions of Rule 23(a), (b)1 and (2), FRCP and as further indicated.--Bryan, J. mn (Consented to)
Oct. 28-68	Filed defendant's notice of rejection and return.
Oct. 30-68	Filed ANSWER of defts. Missouri Pacific R. R. Co. et al to complaint of Robert LeVasseur.
Nov. 1-68	Filed affidavit of Michael M. Maney of service by mail.
Nov. 1-68	Filed plaintiff's notice of rejection and return of paper entitled "Notice of Appearance and Demand."
Nov. 6-68	Filed affidavit of Gilbert P. Strelinger.
Nov. 7-68	Filed stip. & order extending time of deft. Mississippi River Corp. to answer the complaint to 11-22-68 and time of plaintiff LeVasseur to make any motion under FRCP 12(f) with respect to the answer of defts. Missouri Pacific Railroad Co. et al is extended to 12-2-68--MacMahon, J.
Nov. 14-68	Filed ANSWER of deft. Mississippi River Corporation to complaint of Robert LeVasseur.
Nov. 26-68	Filed Interrogs. propounded by pltffs. to deft. Missouri Pacific Railroad Co.
Nov. 29-68	Filed Notice of Intention to intervene
Nov. 11-68	Filed stip and Order time of deft. Missouri Pacific RR Co. to object to interrogs. of pltffs. be dxt. from 12-5-68 to 1-6-69. Time of deft. to answer interrogs. is ext. to 2-6-69 - so ordered

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JUDGE WITHHELD

DATE	PROCEEDINGS
Jan. 19-68	Filed affidavit & Notice of motion of Rosalie J. Leventritt, et al to intervene as pltff. --- ret. 1-7-69.
Jan. 19-68	Filed Memorandum of Rosalie J. Leventritt, et al in support of application for intervention.
Jan. 19-68	Filed pltff's interrog. to deft. Mississippi River Corp.
Jan. 27-68	Filed stip and Order - time of deft. Miss. River Corp. to file objections to interrog. be ext. to 1-14-69 - so ordered - Fr. J.
Jan. 3-69	Filed stip and order time of deft. Missouri Pacific to object to pltff's interrog. is ext. from 1-6-69 to 2-3-69 and time of deft. to answer interrog. is ext. from 2-6-69 to 2-21-69 = so ordered Palmieri, J.
Jan. 6-69	Filed Stip. (pltffs. Betty Levin) the notice of motion ret. 1-7-69 be adj. to 1-14-69
Jan. 10-69	Filed Memorandum of Deft. Mississippi River Corp. and Missouri Pacific Railroad Co. in opposition to motion for leave to intervene ret. 1-14-69
Jan. 10-69	Filed Memorandum of Pltffs in Opposition to motion for leave to Intervene
Jan. 10-69	Filed Affdvt. on behalf of pltffs. in opposition to motion for leave to intervene ret. 1-14-69
Jan. 10-69	Filed Stip and Order time of deft. Mississippi River Corp. to file objections to interrog. ext. to Jan. 18 and time to answer interrog. ext. to 1-23-69. so ordered - Horlands, J.
Jan. 20-69	Filed stip and Order time of deft. Miss. River Corp. to file objections to interrog. be ext. to 2-8-69 - so ordered - Bryan, J.
Jan. 31-69	Filed stip and Order time of deft. Miss. River Corp. to answer interrog. be ext. to 2-21-69 so ordered Bryan, J.
Feb. 6-69	Filed stip and Order - time of defts. Mississippi River Corp. and Missouri Pacific RR Co. to object to the interrog. is ext. from 2-1-69 and 2-3-69 to 2-17-69. --Weinfeld, J.
Feb. 6-69	Filed stip and Order time of defts. Missouri Pacific R.R. Co. and Mississippi River Corp. to object to interrog. ext. from 2-17-69 to 2-21-69 --so ordered--Edelstein, J.
Feb. 6-69	Filed Memorandum of deft. Miss. Pac. RR Co. in support of objections to interrog.
Feb. 26-69	Filed defts. Objections to interrog. ret. 3-13-69 Room 506 10 A.M. (Notice of Motion)
Feb. 26-69	Filed Memorandum of deft. Miss. River Corp. in support of objections to interrog.
Feb. 26-69	Filed deft. Notice of motion ret. 3-13-69 10 A.M. Room 506 to sustain objections to interrog.
Mar. 10-69	Filed stip and Order time for deft. Missouri Pacific R.R. Co. to answer pltffs. interrog. is ext. from 3-3-69 to 3-10-69. -- so ordered --Cannella, J.
Mar. 11-69	Filed Defts. Mississippi River Corp. Answers to interrog.
Mar. 11-69	Filed Defts. Missouri Pacific Answers to Interrog.
Mar. 12-69	Filed stipulation that defts. motions (Miss. River Corp. and Missouri Pacific R.R.) ret. on 3-13-69 be adj. to 3-20-69
Mar. 19-69	Filed defts. stipulation that the motions of Miss. Riv. Corp. and Missouri Pac. R.R. Co. for orders pursuant to Rules 30 b and 33 be adj. to 4-24-69
Mar. 13-69	Filed memo end. on motion filed Feb. 26, 1969 = motion consented to Settle order on notice --Tenney, J.
Mar. 13-69	Filed memo end. on motion filed Feb. 26-1969 -- motion consented to settle order on notice --Tenney, J.

THE WINDS

1161 transcript of record of proceedings Jan. 15, 1939 - filed in
closed slip and Oed. 1 - the motion by draft, filed in the case by
the Mississippi River Corp. for orders under Rule 10 b and 11
objection to same in interrog. by pltf. recd. 6-12-39 and
hitherto conceded to. Pursuant to Gen. Rule 9 1/2 of the rules of
this Court the objections of KSPac to said interrog. have been
replies between counsel as indicated, etc. - so ordered -

Tennyson, J. M.

7-69 File 1 strip and order time of deft. Missouri Pacific RR Co. to answer pltffs, interrog, is ext. to 7-11-69 --

14-69 Filed Answers to plaintiffs, Interroga, of deft., Miss. River Corp.

4-69 Filed supplemental Answers to plffs. interrog. of deft. Missouri
Pacific RR

15-69 Filed Additional memorandum on behalf of Rosalie J. Ilventri, etc.
in support of application for intervention.

15-69 Filed Opinion #36012 -- Accordingly, applicant is hereby denied permission to intervene pursuant to FRCP 24-b. The motion is denied in all respects. so ordered -- Harlands, J. [initials]

10-60 Filed consent to substitution of attorney for deft. Mississippi River Corp. 8-11-71 Filed defts' interrogatories to pltrf Allegheny Corp.

1971 Filed 04/19/71 Plaintiff shall file a notice of cause & state in 20 days or action to be dismissed-Edelstein, Ch. J., 5/16/

2-71 Filed stip and order that time for plff Alleghany Corp. to serve its answers or object to the interrog., by defts is extended from 12-11-71 to 1-10-72 Ryan J.

10-72 filed stip & order that time for pltff Allegheny Corp. to serve and re & object to
interrog. of defts' is extended from 1-10-72 to 1-24-72. So ordered. In re
filed stip & order that time place for pltff Allegheny Corp. to serve its
objections to interrog. of defts' is ext. from 1-24-72 to 1-31-72. So ordered.
Hirschfeld, J.

4-12 filed pltff's (Alleghany Corp.) notice to take deposition of a witness William Uyer on 6-19-72. pltff's will take depositions of the following persons as indicated.

Pltf's notice to take deposition of Weyer, Dick & Co. on 6-19-72
Pltf's notice to take deposition of a witness William Her on 6-17-72

77 Filed plaintiff's notice to take a position of witness MS Equipment date 6-20-42
78 Filed Suppl. interrogatories propounded by plaintiff's deponent in River date 6-20-42

72 Filed Stip & Order that pursuant to General Rule 2.1(f) of the Rules of this Court, the Clerk shall issue a summons to the Plaintiff in the amount of \$100.00.

Court certain of the objections of Alleghany Corp. to interrogatories and
dicta on 11-11-71 have been resolved between counsel as indicated. The
Alleghany Corp. to serve answers to the foregoing interrogatories is set to do
So Ordered- Linfield J.

filed intended and supplemental answers to interrogatories by April 1, 1972.

1172 Filed Notice of Motion re: Answer Interrogs. Ret.-in ROOM 1106 before 11:15
on 7/20/72 at 10 AM

12-77 Filed Notice to take Deposition of Alleghany Corp.
12-77 Filed Memorandum in support of defendants' motion to compel discovery at:

72 Filed stipulation and order extending def'ts, Missouri Pacific Railroad Co. and Mississippi River Corp.'s time to answer or object to interrog's.

34-22 Filed 8/2/72 So. ordered. Meinfeld, J.
Affidavit of service, by mail.

DATE	PROCEEDINGS	ASSIGNED TO WEINFELD J.	Date Order & Judgment Not
Jul 18-72	FILED PLTFF. (ALLEGHANY CORPORATION) AMENDED & SUPPLEMENTAL ANSWERS TO INTERROGATORIES, SERVED ON IT BY DEFTS.		
July 19 72	Filed Stip & Order that the annexed pages are substituted for, and now replace the following pages of "Answers and Objections of Pltff Alleghany Corp. to Defts' interrogs," served on 1-31-72 and filed on 2-1-72. So Ordered- Weinfeld J.		
JUL 20 72	Filed Stip & Order that defts consent to the filing of the "Amended Supplemental Complaint of Intervenor Alleghany Corp." & that defts' time to answer shall be ext. to Aug 9 1972. Weinfeld J.		
JUL 20 72	Filed Amended Supplemental Complaint of Intervenor Alleghany Corporation.		
Aug 2-72	Filed Transcript of Record XXXX dated May 26-72.		
Aug 4-72	Filed Stip & Order that deft's motion dated July 10-72 to compel alleghany corp. to answer certain of defts interrogatories, dated 11-11-72 is hereby withdrawn. WEINFELD, J.		
Aug 9-72	Filed Amended Complaint.		
AUG 17 72	Filed Stip & Order that defts' time to answer etc re: Amended Suppl. complaint of Intervenor Alleghany Corp. shall be ext. to Aug. 16 1972. So Ordered: Weinfeld J		
Aug. 17-72	Filed stip. & order that the deposition of Alleghany by Kirby will maxh be held 9-11-72 and deposition of Clifford Ramsdell adjourned to an agreed date and deposition of John Burns on 9-26-72. --Weinfeld, J.		
Aug. 17-72	Filed stip. & order extending defts' time to answer to amended complaint to 8-29-72. --Weinfeld, J.		
Aug 17-72	Filed ANSWER of defts Missouri Pacific Railroad Co, Robert H. Craft, T.C.Davis and Thomas F. Milbank to Alleghany Corp's amended supplemental complaint.		
Aug 18-72	Filed ANSWER of deft Mississippi River Corp. to Alleghany Corp's Amended Supplemental Complaint.		
Aug 18-72	Filed affdvt of service by mail, by Luis B. Pacquin.		
Aug 21-72	Filed pltff's interrogatories propounded to deft Missouri Pacific.		
Aug 23-72	Filed pltff's interrogatories propounded to deft Missouri Pacific.		
Aug. 24-72	Filed stip & order that deposition of the following has been adj. as indicated. So ordered. Weinfeld, J.		
Aug. 28-72	Filed interrogs to deft. Missouri Pacific RR. Co.		
Aug. 28-72	Filed interrogs to deft. Missouri Pacific RR. Co.		
Aug. 28-72	Filed interrogs to Mississippi River Corp.		
Aug. 28-72	Filed interrogs to Mississippi River Corp.		
Aug. 28-72	Filed stipulation and order extending time to serve answers to interrogs. to 8/29/72. So ordered. Weinfeld, J.		
Aug. 30-72	Filed MEMER of defts. Missouri Pacific Railroad Co., Robert H.Craft, T.C.Davis and Thomas F. Milbank to betty Levin's Amended Complaint. S&C		
Aug. 30-72	Filed Missouri Pacific Railroad Co.'s Answers to Pltfs'.Supplemental Interrogs.		
Aug.30-72	Filed Supplemental Answers of Pltf. Alleghany Corp.to defts'.Interrogs.		
Aug.31-72	Filed Mississippi Supplemental Answers to Pltfs'.Supplemental Interrogatories.		
Sep.1-72	Filed ANSWER of deft. Mississippi River Corp.to Betty Levin's Amended Complaint.		
Sept.1-72	Filed Affidavit of Service by mail of Answer to Amended Complaint, on 8/29/72.		
Sept6-72	Filed pltff's (Alleghany corp.) Request for documents as indicated from deft. Missouri Pacific Railroad Company.		
Sep 7-72	Filed affidavit and notice of motion of pltff Alleghany Corp. to limit depositions of Kirby & Byrnes before Weinfeld, J.		
Sept7-72	Filed affidavit of Carol L. Neumann, in opposition to pltff's motion.		
Sept 7-72	Filed defts memorandum in opposition to motion.		
Sept7-72	Filed pltffs. memorandum in support of protective order.		

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DATE	PROCEEDINGS	Date Judge
Sept 7-72	Filed Memo Endorsed on Motion Filed this date., Motion denied Weinfeld, J.	J.A.
Sep. 8-72	Filed Notice to Admit.	
Sep. 15-72	Filed Supplemental Interrogs. propounded by pltfs. to Missouri Pacific R.R.Co.	
Sep. 15-72	Filed Supplemental Interrogs. propounded by pltfs. to Mississippi River Corp.	
Sep 21-72	Filed pltff-intervenor's interrogatories to T. Davis.	
Sept 19,72	Filed Answers and Objections of Deft Missouri Pacific R.R.Co to Pltf's Interrogs.	
Sep. 19,72	Filed Answers and Objections of Deft. Missouri Pacific R.R.Co to Pltf's Interrogs.	
Sep. 27,72	Filed Interr. of Pltffs to Deft Missouri Pacific R.R.Co.	
Sep. 27,72	Filed Interrog. of Pltffs to Deft Mississippi River Corp.	
Sep. 27,72	Filed Interr. of Pltffs to Deft Missouri Pacific R.R.Co.	
Sep. 28,72	Filed Interr. of Pltffs to Defts Missouri Pacific Railroad Co. Robert H.Craft, T.C. Davis & Thomas Milbank	
Oct. 5,72	Filed Pltffs' Suppl. Interrogatories.	
Oct. 10,72	Filed Missouri Pacific Railroad Co's Suppl. Answer to "Pltffs" Suppl. Interrog.	
Dec. 22-72	Filed ORDER that a hearing shall be held before this Court on 1/25/73 at 10 AM EST in ROOM 506 of the U.S. Courthouse, for the purpose of determining whether the proposed settlement should be approved, etc,etc; ordered that notice of hearing shall be mailed as indicated within one week of entry of this order, by first class mail,etc., and published in The Wall Street Journal once within one week after entry of this order, Weinfeld, J. (mailed notice).	
Jan. 12,73	Filed Deft Missouri Pacific Railroad Co.'s Affdvt.	
Jan. 19,73	Filed Letter from Winchester F. Ingersoll, Jr. 381 Bway, Cambridge, MASS. 02139 to Clerk of Court dated January 17,73 by certified Mail #080108, Special Delivery re:Proposed Settlement ,etc. (sent to Judge Weinfeld)	
Jan. 23,73	Filed Memorandum of Alleghany Corp in support of Stipulation & Agreement of Settlement.	
Jan. 23,73	Filed Affdvt of M.Lauck Walton Supporting Settlement.	
Jan. 23,73	Filed Memorandum of Parties in reply to objections to proposed settlement.	
Jan. 23,73	Filed Affdvt of John J. Burns, Jr. Supporting Settlement.	
Jan. 24,73	Filed Objections to Proposed Settlement..	
Jan. 24,73	Filed Notice of Appearance by LeBoeuf,Lamb ,Leiby & MacRae; attys for Franklin National Bank (Missouri Pacific Railroad Co)	
Jan 29-73	Filed Affidavit by Edward Garfield and Barbara Garfield, Objectants.	
Feb.1,73	Filed Defts' Supplemental Reply Memorandum.	
Jan. 30,73	Filed Affdvt of David M.Day in connection with objections of Edward Garfield and Barbara M.Garfield to proposed plan of settlement.	
Jan. 30,73	Filed Deft Mississippi's Memorandum in support of Proposed Settlement.	
Jan. 30,73	Filed Affdvt of Deft Mississippi River Corp ("Mississippi") by Everett L.Willis.	
Jan. 30,73	Filed Affdvt of F.LLoy Jones for Deft Missouri Pacific Railroad Co. Robert H.Craft, T.C.David and Thomas F.Milbank.	
Jan. 30,73	Filed Memorandum of Defts in reply to objection to proposed settlement by Edward and Barbara M.Garfield.	

CLASS ACTION

67 Civ. 5095 BETTY LEVIN, ALLEGHANY CORP, AND ROBERT LEVASSEUR VS. MISSISSIPPI RIVER CORP
MISSOURI PACIFIC RAILROAD CO, ROBERT H. CRAFT, T.C.DAVIS AND THOMAS F. MILD

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Mar.19,73 Filed Affdvt of Pltffs' Counsel Sheldon H. Elsen, Abraham L. Pomerantz and John Lowenthal & support of Proposed Settlement.

and T.F.

Mar.19,73 Filed Affdvt of David W. Peck for Dfts. Missouri Pacific Railroad Co. & Robert H. Craft, T.C.

Mar.19,73 Filed Affdvt of F.L. Lee Jones for Dfts. (except Mississippi River Corp) supporting settle

Mar.19,73 Filed Affdvt of Downing B. Jenks for Dfts. Missouri Pacific Railroad Co.

Mar.19,73 Filed Affdvt of Everett I. Willis for Dft Mississippi River Corp.

Mar.19,73 Filed Dfts' Joint Memorandum in response to requests of Court at 1/25/73 Hearing on proposed settlement.

Mar.19,73 Filed Pltffs Levin and LeVasseur's Memorandum in support of proposed settlement.

Mar.19,73 Filed Dft Mississippi's Memorandum in support of Proposed settlement.

Mar.19,73 Filed Memorandum of Dfts Missouri Pacific RR Co, Robert H. Craft, T.C. Davis & Thomas F. in support of proposed settlement.

Mar.19,73 Filed Memorandum of law on behalf of Edward Garfield & Barbara M. Garfield, objectants to proposed settlement.

Mar.19,73 Filed Affdvt of F. Lee Jones for dfts (except Mississippi River Corp)

Mar.19,73 Filed Dfts' Suppl. Reply Memorandum.

Mar.19,73 Filed Reply Affdvt of Edward Garfield.

Mar.19,73 Filed Objections of Jacob R. Cohen and June Cohen to Approval of Proposed Settlement.

Mar.19,73 Filed Notice of Intention to object by Jacob R. Cohen & June Cohen (atty for objectors)

Mar.19,73 Filed Letter from William R. Eason to Judge Weinfeld dated 3/9/73.

Mar.19,73 Filed Pltff Alleghany Corp's Notice of Motion before Judge Weinfeld, Room 1106, 7/25/72

Mar.19,73 Filed Memorandum in support of Pltffs' motion to compel discovery.

Mar.19,73 Filed intervening pltff Alleghany Corp's Affdvt of M. Lauck Walton.

Mar.19,73 Filed " " " " " William T. Livingston.

Mar.19,73 Filed " " " " " M. Lauck Walton pursuant to Gen. Rule 9

Mar.19,73 Filed Affdvt of Gilbert P. Strelinger for Missouri Pacific Railroad Co.

Mar.19,1973 Filed Memorandum of Dft. Missouri Pacific Railroad Co in opposition to Pltffs' motion to compel discovery.

Mar. 19,73 Filed Memorandum in reply to Dft Missouri Pacific Railroad Co's Memorandum in opposition to Pltffs' Motion to compel discovery.

Mar.19,73 Filed Deposition of Downing B. Jenks by Sheldon H. Elsen on 6/21 and 6/22/72. M/N

Mar.19,73 Filed Deposition of Downing B. Jenks by Sheldon H. Elsen and M. Lauck Walton on 9/20/72. M/N

Mar.19,73 Filed Appendix to Dfts' Joint Memorandum.

Mar.19,73 Filed Stipulation and proposed Order of Dfts (all except Mississippi River Corp).

Mar.19,73 Filed OPINION#39329. This is a motion pursuant to Rules 23 and 23.1 of FRCP for approval of settlement agreement of a class action, as indicated, etc. Settlement is approved and judgment may be entered accordingly. Weinfeld, J.

Am 5/22 Filed Petitioners' Notice of Motion to amend and

67 Civ.5095

Wein

BETTY LEVIN ET AL VS. MISSISSIPPI RIVER CORP ET AL 67 Civ.5095

Apr.5,73(Cont'd) in Room 705, 2:30 P.M. before Judge Weinfield & Affdvt of William R. Wesson in support of Motion.

Apr.13,73 Filed Memo END. on Notice of Motion to amend opinion & Judgment dated 4/5/73. Motion is denied. All parties acknowledge that objector Wesson has a right of appeal from the order entered herein or the judgment to be entered thereon. Weinfield, J. mm

Apr.13,73 Filed Memorandum in opposition to motion of William R. Wesson to Amend Opinion and Judgment.

Apr.16,73 Filed Letter from Michael Paul Cohen dated 4/11/73 to Clk of Court giving correct address to be reflected on docket sheet.

May 10,73 Filed Notice of Appeal from Denial of Motion(Mailed Copies)

May 10,73 Filed Notice of Appeal from Judgment (Mailed Copies)

May 2,73 Filed Deft. Missouri Pacific Railroad Co, Craft, T.C. Davis & Milbank Notice of Settlement before Judge Weinfield on 4/24/73. 10:00 A.M.

May 2,73 Filed ORDER AND FINAL JUDGMENT. Ordered that terms and prov. of Stip of Settlement to Missouri Pacific Railroad Co and member of class are reasonable, etc.; complaint & Amended Complaint of Betty Levin, complaint & Amended SupplComplaint of Alleghany Corp & Robert LeVasseur are dismissed as against all dofts with prejudice and without costs to any party, etc as indicated. Weinfield, J. Affdvt of Dorothy M. Strickler.

JUDGMENT ENTERED. 5/2/73.

ENT.5/17/73 mm

May 22-73 Filed change of address of Donovan, Leisure, Newton & Irving to 30 Rockefeller Plaza, N.Y. Tele. 489-4100.

Jun 1-73 Filed transcript of Record of Proceedings of Jan. 25, 1972.

Jun 6-73 Filed stipulation designating exhibits and certain documents to be transmitted to the U.S. Court of Appeals.

Jun 6,73 Filed Notice to Docket Clerk that record on appeal has been transmitted to USCA, 2nd Cir on 6/6/73.

Jul 9 - 73 Filed true copy of USCA order affirming judgment of District Court on J. Weinfield's Opinion #6012 - Judgment entered - Clerk mm

Nov.20-73 Filed Notice of Motion to set aside Judgment and order of May 2, 1973 returnable 11/2.

Nov.23-73 Filed stip. and order adj. above motion to Dec-4-1973 -- Weinfield, J.

Nov.30-73 Filed Memorandum in Opposition to Motion to set aside Judgment

Nov.30073 Filed Affidavit of H. Lauck Walton in opposition to the petition of Michael Mounousis

Dec.7,1973 Filed memo end on petition. Michael Mounousis' motion dated Nov. 20, 1973 setting aside order & final judgment, etc. Motion is denied, J. Weinfield, J. mm

(see pg. 9)

DATE

PROCEEDINGS

Dec. 19-73 Filed stip. and order that the forms to be used for the tender offer to be made by deft. Mississippi River Corp. and for the tender to it of shares of Commons Stock of Missouri Pacific Railroad Co. as contemplated by Sections 1,2 and 1,3 of the settlement agreement dated Dec. 18, 1972 shall be substantially the forms annexed hereto as Exhibits AB and C. So ordered. Weinfeld, J. (upon the representation that the facts set forth in the attached documents are accurate and are not contrary to the terms of the order entered by this Court approving the settlement agreement.

Jan. 2-74 Filed petitioner Michael Moumousis notice of appeal to the USCA from petitioner's motion to set aside the final order and judgment entered on May 2, 1973, said motion having been argued on Dec. 4, 1973, and the denial having been entered on Dec. 7, 1973. (copies mailed).

Mar. 4-74 Filed stip. and order that the motion of Napoleon Gabriel be adj. to March 26, 1974. So ordered. Weinfeld, J.

Mar. 4-74 Filed petitioner's affdt. and notice of motion for an order modifying the order and final judgment entered May 2, 1973 approving the stip. of settlement, etc. ret. on March 12, 1974.

Mar. 11-74 Filed memorandum of pltfs. Levin and LeVassour in opposition to petition of Napoleon G. Gabriel to modify the final judgment herein.

Mar. 13-74 Filed brief of counsel for pltfs. Levin and LeVassour in support of their application for allowance of fees and expenses.

Mar. 13-74 Filed pltfs. Levin and LeVassour affdts. and notice of motion for an order directing defts. Missouri Pacific RR Co. and Mississippi River Corp. to pay applicants Orana, Elsen and Peltain and Pomeranta Levy and Block and Handek the sum of \$2,000,000 as legal fees and the sum of \$22,422.06 for their disbursements ret. on March 26, 1974.

Mar. 13-74 Filed memorandum in support of the application of pltf. Alleghany Corp. for fees and expenses.

Mar. 13-74 Filed pltf. Alleghany Corp. affdt. and notice of motion for allowance and ret. to said pltf. of counsel fees and expenses incurred ret. on March 26, 1974.

Mar. 20-74 Filed memorandum of corporate defts. in answer to fee applications of pltf. Alleghany Corp. and attys. for pltfs. Levin and LeVassour.

Mar. 22-74 Filed Napoleon G. Gabriel supplemental petition.

Apr. 8-74 Filed memo and, on petitioner's motion dated March 6, 1974 for an order modifying the order and final judgment dated and entered May 2, 1973---This motion is without merit, etc. as indicated. Weinfeld, J. n/n

Jun 18-74 Filed petitioner's notice of appeal to the USCA from the final order dated April 8, 1974 which denied appellants motion to amend its judgment so as to make said judgment not binding on appellants and others similarly situated. (copies mailed).

Jun 26-74 Filed OPINION #40870--Pltf. Alleghany's application for reimbursement in the sum of \$850,000 is granted. The court deems \$1,750,000 as fair and reasonable to the attys. for the pltfs. Levin and LeVASSOUR. These cts are also entitled to reimbursement for disbursements in the sum of \$22,422.06. Judgment may be entered accordingly. Weinfeld, J. n/n

(Moria)

DATE	PROCEEDINGS
Jul 3-74	Filed JUDGMENT # 14,567 --ORDERED that the defts. Mississippi River Corp and Missouri Pacific RR Co. pay the sum of \$850,000 for legal fees and disbursements to ptlf. Alleghany Corp., to be paid in equal parts by such corp.;Ordered that the defts. Mississippi River Corp. and Missouri Pacific RR Co. pay the sum of \$1,750,000 as legal fees and the sum of \$22,422.06 as disbursements for a total of \$1,772,422.06 jointly to Messrs. Orans, Elsen and Polstein and Pomerantz Levey, Haudek & Block to be pd. in equal parts by such corp. Weinfeld, J. m/n Judgment entered, Clerk, entered on docket 1/9/74.
Jul 23-74	Filed Notice of Appeal for Petitioner, to U.S.C.A. from the final judgment of 7/3/74
Aug. 1-74	Filed appellants Jacob Cohen and June Cohen notice of appeal to the USCA from the judgment requiring deft. Missouri Pacific RR to pay legal fees and disbursements to ptlf. Alleghany Corp. entered on July 3, 1974. (copies mailed).
Aug. 1-74	Filed bond on undertaking for costs on appeal in the amt. of \$250.00 by the Fidelity and Deposit of Maryland.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
BETTY LEVIN, ALLEGHANY CORPORATION :
and ROBERT LeVASSEUR,
Plaintiffs, : 67 Civ. 5095 (EW)
-against- : JUDGMENT
MISSISSIPPI RIVER CORPORATION, :
MISSOURI PACIFIC RAILROAD COMPANY, :
ROBERT H. KRAFT, T. C. DAVIS and
THOMAS F. MILBANK, :
Defendants. :
-----x

Plaintiff Alleghany Corporation and the attorneys for plaintiffs Betty Levin and Robert LeVasseur, to wit, Messrs. Orans, Elsen & Polstein and Messrs. Pomerantz Levy Haudek & Block, have applied for the allowance of the fees and expenses in this action.

A hearing on the application was held on March 26, 1974, and the Court has rendered its decision dated and filed June 26, 1974. It is

ORDERED, ADJUDGED AND DECREED that the defendants Mississippi River Corporation and Missouri Pacific Railroad Company pay the sum of \$350,000 for legal fees and disbursements to plaintiff Alleghany Corporation, to be paid in equal parts by such corporations; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants Mississippi River Corporation and Missouri Pacific Railroad Company pay the sum of \$1,750,000 as legal fees and the further

sum of \$22,422.06 as disbursements, for a total of \$1,772,422.06,
jointly to Messrs. Orans, Elsen & Polstein and Pomerantz Levy
Haudek & Block, to be paid in equal parts by such corporations.

Dated: New York, New York
July 3, 1974.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN, ALLEGHENY CORPORATION
and ROBERT LEVASSEUR,

Plaintiffs,

40870
FF40878

-against-

67 Civil 5095

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CRAFT v. C. DAVIS and
THOMAS P. MIRBANK,

OPINION

Defendants.

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New York, New York

Attorneys for Plaintiff Robert LeVasseur

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WILLIAM H. RAUDEK, ESQ.
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JOHN LOWENTHAL, ESQ.
Of Counsel

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Jacob R. Cohen and June Cohen

OBJECTORS PRO SE:

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MR. WINCHESTER P. INGERSOLL, JR.
381 Broadway
Cambridge, Massachusetts

MR. WILLIAM R. WESSON
1550 Ocean Avenue
Mantoloking, New Jersey

EDWARD M. HENFELD, D. C.

This is the final stage in the settlement of these consolidated class actions; hopefully, the closing chapter in the controversy and litigations in which the Class A and Class B shareholders of the Missouri Pacific Railroad Company ("MoPac") have been embroiled for almost two decades. Familiarity is assumed with this court's (1) opinion approving the terms of the settlement, as well as with the related litigation which established the voting (2) rights of the Class B stock. The notices sent to stockholders of the hearing upon terms of the proposed settlement also set forth the applications by attorneys for allowances and that their consideration would be deferred until after entry of final judgment. The settlement pursuant to the final judgment has been fully consummated. The matter now before the court is the application of plaintiff

(1) Levin v. Mississippi River Corp., 59 F.R.D. 353 (S.D.N.Y.), aff'd on opinion below sub nom. Wesson v. Mississippi River Corp., 486 F.2d 1398 (2d Cir.), cert. denied, 414 U.S. 1112 (1973).

(2) Slayton v. Missouri Pac. R.R., 233 F. Supp. 747 (E.D. Mo. 1964), rev'd sub nom. Mississippi River Fuel Corp. v. Slayton, 359 F.2d 106 (8th Cir. 1966), rev'd sub nom. Levin v. Mississippi River Fuel Corp., 386 U.S. 162 (1967).

Allegany Corporation for reimbursement of fees paid by it for legal, expert and consultant services; also, the application of attorneys for plaintiffs Levin and LeVasseur for allowances for their services, plus disbursements. Under the terms of the settlement the allowances awarded by the court are to be paid equally by defendants Mississippi River Corporation ("Mississippi") and MoPac.

The notice to stockholders stated that Allegany's request for reimbursement in the sum of \$850,000 would not be opposed by MoPac and Mississippi; it also stated that the Levin-LeVasseur attorneys' application for an allowance in the sum of \$6,953,000 would be opposed by MoPac and Mississippi. After the affirmance of the judgment authorizing the settlement and following approval by the stockholders and by the Interstate Commerce Commission, the interested parties, in a desire to avoid litigation on the fee issue, reached an agreement whereby the Levin and LeVasseur attorneys limited their application for fees to \$2,000,000, plus disbursements of \$22,422.06, which Mississippi and MoPac would not oppose.

Upon the return date of the hearing of these

applications, five shareholders objected to the payment of the fees as requested, but generally their views reflected continuing objection to the settlement. Two of them, owners of Class A stock, opposed payment of fees by MoPac on the ground that only the Class B stockholders or other allied interests should be assessed the costs of the litigation. The court finds that the objections raised are without substance. The settlement, as this court noted in approving it, was of substantial value to the B stockholders; it was also of substantial value to the corporation and necessarily all its stockholders in ending the costly litigation which, had it gone to trial, whatever its outcome, would not have ended the strife between the two classes, with continuing diversion of MoPac's officers from their essential duties in operating the railroad and advancing its other economic interests. MoPac's commitment to pay one-half the allowed fees may be considered an additional cash payment to the Class B shareholders as part of the settlement, so that what they received is on a net basis. Accordingly, the sole issue that remains is what is a fair and reasonable allowance for the services by the respective applicants.

The general factors to be considered in awarding fees in litigation of this type have recently been specified by our Court of Appeals in City of Detroit v. Grinnell Corp.,⁽³⁾ and need not be enumerated in detail. Although that was an antitrust suit, the same general standards may be applied. While they serve as guides, no precise or mathematical formula is mandated; what is required is that, giving due consideration to all relevant and significant factors, the court award a sum that is fair and reasonable -- one that is neither excessive nor inadequate.⁽⁴⁾

A preliminary word is in order. The applicants, in stressing the value of their services in terms of benefit to the Class B shareholders, refer to the \$850-16 share package of new common stock for each share of old Class B stock as a conversion rate of \$2,450, reflecting a gross settlement of \$97,340,950 for all 39,731 shares of the old Class B stock. Thus, Alleghany, applying the \$2,450

(3) F.2d ___, Docket Nos. 73-1211, 73-1420 (Mar. 13, 1974); see Lindy Bros. Builders v. American R. & S. San. Corp., 487 F.2d 161 (3d Cir. 1973).

(4) Cf. Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., 481 F.2d 1045 (2d Cir. 1973).

per Class B share exchange factor, notes that the average highest annual bid price for Class B shares for the period from 1965 to 1971, following the Supreme Court's ruling in the voting rights case, was approximately \$1,778. Based upon the 39,731 Class B shares outstanding on December 31, 1971, Alleghany argues that this amounts to an aggregate increase in the value of the Class B stock of at least \$26,699,232, and stresses that its requested allowance of \$850,000 is about 3% of the aggregate increase in the value of the Class B stock. The Levin-LeVasseur attorneys, using the same exchange factor of \$2,450, take the market value of the Class B stock after the Eighth Circuit Court of Appeals ruling (rejecting class voting rights) and just prior to the Supreme Court's granting of certiorari, \$530 per share, and compute the net benefit to the Class B shareholders at \$76,283,520. This conceptual theory of benefit somewhat overstates the matter. The Class B shareholders received for their shares what the court deemed a fair and reasonable equivalent on a compromise basis to put an end to continuing controversy between them and the Class A stockholders -- a settlement that offered "a permanent solution to the longstanding

(5)

impasso." This was no recovery of a cash fund or securities which gave the shareholders something of value they did not already own. They were exchanging stock already in hand for other stock of a different class plus cash on a basis deemed to be fair and reasonable in the light of the respective rights of the two groups of litigants, the strength and weaknesses of their respective positions, the probabilities of ultimate success upon a trial, and an evaluation of the terms of the settlement compared with the likely benefits in the event of success upon a trial. However, rejecting the applicants' theory in no respect diminishes the value of their services in achieving a favorable settlement with its consequent and anticipated benefits to the corporation and its stockholders. On the basis of the sixteen shares received by the Class B stockholders, their annual dividends at \$5 per share will be \$80 instead of the \$5 previously declared; also the marketability of the common shares is improved and the settlement is net to each shareholder. Other benefits are set forth in the court's opinion approving the settle-

(5) *Levin v. Mississippi River Corp.*, 59 F.R.D. 353, 373 (S.D.N.Y. 1973).

ment. Indeed, the simple fact is that the settlement achieved more for the Class B stockholders than if they had been successful in the litigation, since it at once removed the root cause of their continuing controversy, whereas even success in litigation would not have brought about that result.

The principal thrust of the plaintiffs' claims was directed toward MoPac's restricted dividend policy and the relief sought included the declaration of additional dividends in prior years and increased dividend distribution in the future. The issues raised by the defense required not only legal services of a high order, but the advice and assistance of certified public accountants, investment analysts and railroad economists. The pretrial discovery and preparation for trial involved the study of the complex history of MoPac's reorganization, including analysis of the various ICC opinions relating to the several proposed plans, the voting rights litigation, and relevant accounting principles, and evaluation of volumes of corporate financial data of defendants' and other railroads.

The discovery process, of necessity, was extensive. It encompassed not only depositions of witnesses, but the preparation of meaningful interrogatories and exhaustive inspection and investigation of defendants' files in an effort to obtain documentary support for plaintiffs' contentions, including the allegations of conspiratorial conduct to withhold dividends in order to depress the price of the Class B stock. The importance of dredging up meaningful information to establish the plaintiffs' claims necessarily required the services of senior rather than associate attorneys in the deposition discovery process. The negotiations leading to the settlement, which at times appeared impossible of achievement, were prolonged and were consummated only on the eve of trial when the attorneys were fully prepared, on the basis of their pretrial activities, to proceed to trial. After the settlement was reached, the attorneys expended considerable time in meeting objections to its approval, and after its approval, in seeking to uphold it in the Court of Appeals and before the ICC, and also thereafter in effectuating its terms.

ALLEGHANY'S APPLICATION

This action was commenced by plaintiff Levin in December 1957. Alleghany intervened by leave of court, as did plaintiff LeVasseur. The action was ordered to be maintained as a class action on behalf of all Class B stockholders. Alleghany was the largest Class B stockholder, owning 53%. This majority position obviously made it more than an average litigant in the protection of its interests. Alleghany's attorneys were Donovan, Leisure, Newton & Irvine, and in all, their fees and expenses and those for the services of other law firms, accountants and financial experts, totalled \$850,000, for which Alleghany seeks reimbursement.

Alleghany's attorneys expended a total of 14,312-1/2 hours in the prosecution and settlement of the action, which included those of senior partners and associates billed at rates charged by that firm and others of similar standing, and totalling \$680,234.68. Upon the hearing a senior partner testified that since the onset of the litigations the attorneys had agreed to bill Alleghany at the rate of \$65 per hour for partners' time

and \$40 per hour for associates' time, averaging \$47.50
(6)

per hour. The attorneys' disbursements amounted to \$59,712.20, or a grand total for Alleghany's attorneys' fees and expenses of \$739,946.88, most of which Alleghany has already paid and has agreed to pay the balance. In addition, to assist in the prosecution and settlement of the action, the attorneys retained the services of other law firms, a certified public accountant, and management, transportation and economic consultants, whose charges they certified as fair and reasonable, and which totalled \$110,053.12, which Alleghany has paid. Thus, the total paid or owed by Alleghany for all services is \$850,000.

The sum requested, measured by any applicable standard -- whether the benefits conferred upon the class, the importance of the litigation to the public, the complexity, magnitude and difficulty of the case, the hours expended by lawyers, their status and standing at the bar or the rates charged -- is fair and reasonable, if not on the modest side. Alleghany's application for reimbursement in the sum of \$850,000 is granted.

(6) At the hearing objectants were afforded an opportunity to cross-examine the attorneys who testified as to their services.

APPLICATION OF ATTORNEYS
FOR LEVIN AND LEVASSEUR

Plaintiffs Levin and LeVasseur were substantial owners of Class B stock. Plaintiff Alleghany, as the majority owner of the Class B stock, had a veto power over corporate action that required the separate approval of the Class B stock; accordingly, independent representation of the minority Class B group was fully justified.

In addition to the principal class action claims with respect to McPac dividend policy, the Levin-LeVasseur group asserted derivative claims on behalf of McPac.

Oxans, Elson & Polstein represented plaintiff Levin, and Boncrantz, Levy, Haudek & Block represented plaintiff LeVasseur, but they cooperated and their application is
(7)
a joint one.

While in some measure the activities of the Levin-LeVasseur attorneys and Alleghany's ran a parallel course, in other respects it did not; in any event, the

(7) The application also includes services of other counsel engaged in this and related litigation, which are set forth in the affidavits in support of the requested allowances. Counsel have agreed among themselves as to the allocation of any award, so it is not necessary for the court to make a specific allocation.

attorneys acted independently in espousing the interests
of the Class B minority group. They also represented
minority Class B interests in the Missouri action which
determined the voting rights of the Class B stockholders.
The attorneys request an allowance of \$2,000,000, reduced
from their original request of \$6,953,000, as noted above,
and \$22,422.06 for disbursements. These applicants urge
that since MoPac and Mississippi are obligated to pay any
fee award, their agreement not to oppose the reduced ap-
plication, particularly in view of their opposition to
the originally requested amount, affords strong assurance
of its reasonableness and accordingly should be given great,
if not decisive, weight. However, to accept as conclusive
the parties' agreement as to fees in a class or derivative
action would mean the surrender of the court's duty and
its discretion. The agreement, while it may have some
relevance, does not relieve the court of its duty to make
an independent appraisal, to "avoid awarding 'windfall fees'"
and . . . likewise avoid every appearance of having done so,
and to award only such fees that are fair, "with an eye to

(8) See Levin v. Mississippi River Corp., 59 F.R.D. 353, 367
(S.D.N.Y. 1973).

(9) moderation" based upon the applicable standards.

The award is sought for services rendered over a ten-year period in this and the related predecessor actions wherein the voting rights of the Class B stock

(10) were defined. The effectiveness and skill of the attorneys who espoused the interests of the Class B stockholders are attested to by the settlement itself. They are of considerable experience in class and derivative stockholder litigation, and their expertise was brought to bear in the instant case on behalf of their clients. Because of the magnitude, complexity and importance of the issues, the lawyers who participated in the various aspects of the litigation in the main were senior attorneys. They were opposed by eminent and able attorneys representing the defendants. The pretrial procedures were conducted with conspicuous ability and were of signal importance in achieving the settlement. The services of the Levin-LeVasseur

(9) City of Detroit v. Grinnell Corp., 233 F. Supp. 747 (E.D. Mo. 1964), rev'd sub nom. Mississippi River Fuel Corp. v. Slayton, 359 F.2d 106 (5th Cir. 1966), rev'd sub nom. Levin v. Mississippi River Fuel Corp., 386 U.S. 162 (1967).

(10) Slayton v. Missouri Pac. R.R., 233 F. Supp. 747 (E.D. Mo. 1964), rev'd sub nom. Mississippi River Fuel Corp. v. Slayton, 359 F.2d 106 (5th Cir. 1966), rev'd sub nom. Levin v. Mississippi River Fuel Corp., 386 U.S. 162 (1967).

attorneys were rendered on a wholly contingent basis and, unlike the Alleghany attorneys, no payment to date has been made to any of them. The total time expended by these attorneys, principally the seniors, was 11,083-1/4 hours. However, this is but one factor, and in this court's view only of relative importance in the instant case.

Upon the hearing of these applications the court questioned whether the portion of the time and the services rendered in the voting rights action which reached the Supreme Court were compensable in this action. After reflection I am satisfied that they are, since the right of the Class B stock to vote separately was the basis and hard core of this litigation. Indeed, the settlement of this action could only have been achieved because of the successful conclusion of the voting rights suit. (11)

The effective veto power of the Class B stock obviously was a principal factor in bringing about the settlement. The fact that the attorneys' applications for fees in the Missouri action were not allowed does not foreclose granting allowances for such services. The Eighth Circuit Court

(11) Cf. Angoff v. Goldfine, 270 F.2d 185 (1st Cir. 1959).

of Appeals, which reversed the district court ruling which did grant them fees, acknowledged "[i]t is undisputed that the Class B stockholders obtained a very substantial benefit from the litigation they instituted and (12) won," but noted that "the right of the named plaintiffs and their attorneys to make a pro rata recovery of fees and expenses against the Class B stockholders . . . is (13) not directly before us in this case," and finally that any benefit to RPPC was only incidental to the main litigation which did not create a new fund for the corporation or the preservation of assets so as to warrant an allowance. Thus the request for special services is proper in this action, which may be considered a companion or related one.

It is at once apparent that these attorneys, on the basis of less hours than those expended by Alleghany's attorneys, are seeking a substantially higher allowance. The services of that firm in achieving the settlement were of equal value to those of the Levin-LeVasseur group. However, as was pointed out at the hearing, and as is the

(12) Missouri Pac. R.R. v. Slayton, 407 F.2d 1078, 1081 (8th Cir.), cert. denied, 395 U.S. 937 (1969).

(13) *Id.* at 1082.

fact, Alleghany's attorneys had a paying client; they received and would receive payment from their client no matter what the outcome of the litigation. Those attorneys, however, faced the prospect of no compensation for almost ten years of extensive and conspicuous services if they did not prevail in this action. The success of the suit, with its thrust directed toward the dividend policy, which centered on the business judgment of directors, obviously could not be foretold -- as this court suggested, at best the probability of ultimate success upon a trial could only be one of "cautious prophecy." (14) Taking into account the difficult and complex problems inherent in the litigations, the total results achieved for the class, the benefit to McFae, the skill and experience of the attorneys, the hours expended by senior and associate attorneys at prevailing rates, the high caliber of opposing counsel, the risk of no compensation or recovery of expenses in the event of nonrecovery, the court deems \$1,750,000 as fair and reasonable. Those counsel are also entitled to reimbursement for disbursements in the sum of \$23,472.06.

(14) *Lavin v. Mississippi River Corp.*, 59 F.R.D. 353, 366 (S.D.N.Y. 1971).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
EDWARD CRAFT, ALUMINUM CORPORATION
and ROBERT CRAFT, Jr.,

Plaintiffs,

67 civ. 5095 (EW)

-against-

MISSISSIPPI RIVER CORPORATION
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CRAFT, T. C. DAVIS and
THOMAS F. MILNAK,

NOTICE OF MOTION
To set aside judge-
ment and order of
May 2nd, 1973

Defendants.

-----x

Sir:

PLEASE TAKE NOTICE, that the undersigned, appearing
for Petitioner **Michael Mousousis**, will move this honorable
Court at the Courthouse, Foley Square, New York, N.Y. in
Room 1305 thereof on the 27th day of November 1973 at 2:15 PM
o'clock or as soon thereafter as counsel may be heard, before
the Honorable Edward Weinfeld, United States District Judge,
for an order (a) setting aside the order and final judgement
dated and entered May 2nd approving the stipulation of settle-
ment of the above captioned case and the recapitalization plan
for Mo Pac, and (b) either reinstating the above captioned
suit, or dismissing the said suit, or approving the Wesson Plan
of Settlement, and (c) granting such other and further relief
as to this Court seems just and proper, for the reasons set
forth in the annexed petition.

Yours very truly,

DATED: Brooklyn New York
15 Nov. 1973.

ONLY COPY AVAILABLE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN, ALLEGHANY CORPORATION
and ROBERT LEVASSEUR,

Plaintiffs,

67 Civ. 5059 (EW)

-against-

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CRAFT, T.C. DAVIS and
THOMAS F. MILBANK

PETITION

Defendants

Michael Moumousis being duly sworn petitions this
court and deposes and states as follows:

2102 Old Mill Road,
Spring Lake Heights

New Jersey 07762 and is an owner of Class B stock of the Missouri
Pacific Railroad Company, (Mo Pac).

(2) That this honorable court in its order and final
judgement dated and entered May 2nd, 1973 retained "jurisdiction
of all matters respecting the consummation of the settlement of
this action pursuant to the Stipulation of Settlement and for
the purposes of entertaining applications for attorneys' fees
and expenses by counsel for plaintiffs Betty Levin and Robert
Le Vasseur and by plaintiff Alleghany Corporation".

RELIEF SOUGHT

(3) Petitioner respectfully requests, in the interest
of justice, and on newly acquired information, not made avail-
able to the court prior to this time, showing the interests of
the plaintiff Alleghany as being in direct opposition to those
of the represented Mo Pac Class B Stockholders, the following:
(a) the setting aside this order and final judgement dated and
entered May 2, 1973 approving the Stipulation of Settlement and

the same; and (b) either reinstating the above captioned suit, or dismissing the said suit, or approving the Wesson plan of settlement.

REASON FOR RELIEF SOUGHT-ALLEGHANY'S INTEREST IN THE SETTLEMENT WAS SELF INTEREST NOT REPRESENTATIVE OF AND IN OPPOSITION TO THAT OF PETITIONER AND ALL CLASS B STOCKHOLDERS SIMILARLY SITUATED

(4) This Court in its opinion on Page 32 stated: "Alleghany self-interest as the owner of 53% of the Class B stock gives assurance that it negotiated to obtain the best possible terms for that group viz- a viz the Class A stockholders". The court also on Page 31 stated that the joint recommendation of the class representatives were "entitled to substantial weight".

From these statements it is clear that the court was unaware, as was the petitioner and other Class B stockholders, that Alleghany's self-interest in disposing of its Class B stock was paramount, and was not representative, or beneficial to petitioner and other Class B stockholders.

(5) On January 27th, 1970 the ICC authorized Alleghany to acquire Jones Motor Co. Inc. and the transaction was consummated on April 30, 1970, despite the fact that Alleghany violated Section 3(4) of the Interstate Commerce Act. This transaction started as early as Sept. 4, 1968 when the agreement to purchase Jones was entered into. / Inadequacies of Protection for Investors in Penn Central and other ICC - Regulated Companies - Staff Study for the Special Subcommittee on Investigations of the Committee on Interstate and Foreign Commerce, H.R. 92nd Congress, July 1971 Staggers Committee, Gov't, Print. 0.59-2970, pages 36-38 / Petitioners Exhibit A attached.

The ICC in its decision of Jan. 27, 1970 conditioned its approval of the acquisition of Jones by Alleghany as follows: "Still further, in accordance with Alleghany's suggestion, we shall require as a condition for consummation of the proposal that the trustee-ship of Alleghany's Mo Pac securities as previously ordered by the commission, be continued subject to the continuing jurisdiction of the Commission". Alleghany Corporation Control and Purchase-Jones Motor Co., Inc. - and Control Erie Trucking Company No. MC-F-10444, 109 MCC 331, 350, decided January 27, 1970; Petitioners Exhibit B attached.

(6) A primary reason for the Alleghany acquisition of the operating rights of Jones was to lessen its tax burden and, be able to "retain and reinvest net earnings and would not be subject to the 70-percent penalty tax". *Id. supra* 109 MCC 331 at pages 339 and 3427. Petitioners Exhibit C attached.

(7) On October 6th 1973, Alleghany through its attorney M. Lauck, Walton, Esq. filed a brief with the ICC with reference to an application seeking the ICC's approval of the recapitalization of Mo Pac as provided for in the settlement agreement and judgment of this court in the instant case. Petitioner attaches a copy of pages 9 and 10 of said brief (Exhibit D) wherein Alleghany argues that the termination of its interest in Mo Pac Class B stock would be in keeping with the public interest, the prior order of the ICC (Jones Motor Co. Inc. 109 MCC 333 *supra*), and would save Alleghany from great financial injury, and relieve the ICC of the burden of supervision of the trust of Alleghany's Mo Pac stock.

(8) It is submitted that Alleghany's role as a class representative for petitioner and other Mo Pac Class B stockholders was not to represent its own interests or that of the ICC but the interests of the Class B stockholders.

Petitioner and others similarly situated were not benefitted by the settlement or the recapitalization but were harmed in the integrity of their property right and exposed to confiscatory taxation in that the cash payment of \$850 per share is subject to be treated as ordinary income.

(9) It is indeed strange that petitioner and others similarly situated would be better off and if the worst had happened viz. dismissal or loss of the original suit. If such happened petitioners property and equity in Mo Pac would be intact and unchanged. The settlement is worse than the worst, in that petitioners equity is reduced from 65.5% to 25.5% and petitioner, and other Class B stockholders, unlike Alleghany with its tax shelter as an operating carrier, is exposed to tremendous taxation on the \$850 per share case settlement.

CONCLUSION FROM ABOVE FACTS: ALLEGHANYS SELF-INTEREST AS A RESULT OF ITS PURCHASE OF JONES MOTOR CO. AND THE ORDER OF ICC IN 1970 WAS SO OVER-RIDING THAT IT COULD NOT AND SHOULD NOT HAVE BEEN REPRESENTATIVE IN THE CLASS SUIT AND THE SETTLEMENT.

(10) The pending settlement and recapitalization of Mo Pac benefits Alleghany and not the represented Class B stockholders of which petitioner is one. Petitioner and others like him would have been better off financially if Alleghany had dropped the suit or had even lost it.

(11) Alleghany, due to the ICC order of 1970 was no longer the real party in interest to continue the suit, much less settle the suit, Alleghanys Mo Pac stock was in trust under the jurisdiction of ICC and Alleghany required the approval of ICC to continue the litigation, and no such approval was given.

(12) Because of the facts as stated in item (11) supra the court lacked the jurisdiction and adjudicatory power to continue and/or settle the suit.

(13) In light of Alleghanys tax shelter as a carrier its interest and those of petitioner and other Mo Pac Class B stockholders were so diverse that the settlement served Alleghany but not Class B stockholders.

(14) In fairness Alleghany should have disclosed its special interest in the settlement to the court and to the stockholders in the proxy statement. If it had so disclosed the court and the stockholders would not have been misled.

(15) The settlement constitutes the taking of petitioners property without due process of law, contrary to Rule 23 of FRCP, for the benefit of Alleghany.

(16) The courts settlement under Rule 23 of FRCP so interprets this rule of procedure as if the rule created substantive rights, a situation beyond the constitutional power of a Federal Court.

(17) This Court must in fairness stop this unfair taking of petitioners property, and that of other Class B stockholders.

THE WESSON PLAN IS THE SOLUTION IN THAT IT HELPS ALLEGHANY DIVEST ITSELF OF MO PAC STOCK, GIVES CONTROL TO MISSISSIPPI, AND ALLOWS THE CLASS B STOCKHOLDERS TO KEEP HIS EQUITY WITHOUT CONFISCATORY TAXATION.

(18) The valuation of Class B stock was never purported, nor could it be attempted, to be attained in the settlement hearings. The figure of \$2450 per share was, as this court stated, for settlement purposes only. There is no question but that there is a grave question as to the true value of Class B stock. Petitioner subscribes to the calculation of Mr. Gabriel in his brief submitted to the ICC at its hearing on this recapitalization plan. Therefore, annexed hereto and made a part of this petition (Exhibit E) is a copy of the

pertinent statements in Mr. Gabriels brief as to the true value of Class B stock as being \$24,800.00 per share. Even if this figure could be debated, nobody questions the fact that the proposed recapitalization reduces the Class B stockholders equity in Mo Pac from 65.5% to 25.5%.

(19) Mr. Wesson, a class B stockholder and a protestor of the recapitalization plan, has proposed an excellent practical and fair solution to the problem facing the parties and the court. A copy of this proposal is annexed hereto and made a part hereof (Exhibit F), the papers being a part of Mr. Wessons testimony before the ICC in its hearing this Sept. 19th on the proposed recapitalization.

(20) Under the Wesson plan:

(a) Alleghany will be able to dispose of its Mo Pac stock at the price acceptable to them of \$2450 per share, and at the same time

(b) Mississippi River Corporation could obtain 51.8% voting control of Mo Pac,; and

(c) Petitioner and other Class B stockholders of Mo Pac would retain their equity in Mo Pac undisturbed, and would not be subject to the confiscatory tax burden which the proposed court approved plan imposes.

Wherefore petitioner respectfully prays that this court will come to the aid of the small investor, protect his property rights, and require fairness and openness on the part of the large corporate investor by (a) granting an order declaring the settlement agreement and the proposed recapitalization of Mo Pac, and all acts of the parties taken on the basis of the same to be legally void because of lack of proper representation by Alleghany in its failure to make full disclosure of its overriding self-interest; (b) either reinstating or dismissing the

original suit, approving the Wesson plan; and (c) for such other and further relief as to this court seems just and proper.

Brooklyn, N.Y.
Dated:--Nov. 1973

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Michael Moumousis

STATE OF NEW YORK
COUNTY OF KINGS

On the 15 date of Nov. 1973
Michael Moumousis appeared
before me and swore to the
truth of the statements in
the above captioned petition.

Gerald M. Carey
Notary Public State of New York
Qual. Kings Co.
#5608849
Term expires 3/30/74

A

[REDACTED]

INADEQUATE PROTECTIONS FOR
INVESTIGATORS OF UNION-CONTROLLED AND OTHER
INTEGRATED COMPANIES

STAFF STUDY
FOR THE
SPECIAL STUDY COMMITTEE ON INVESTIGATIONS
OF THE

COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE
GUIDE ON REPRESENTATIVES
(92d Congress)

inclusive, and Section 20a(2) to (11), inclusive, of the Interstate Commerce Act. *

The ICC has not "otherwise ordered."²⁹

If the Investment Company Act had been determined to be applicable to the Pennsylvania Company, all of the following prohibitions of the Act would have been specifically violated:

1. transaction between affiliate without the prior approval of the SEC, especially transactions involving the transfer of assets;
2. excessive management compensation;
3. improper allocation of expenses between parent and subsidiary company;
4. loans to a parent holding company by a subsidiary;
5. guaranty by a subsidiary of loans made to the parent holding company by a third party;
6. sale of securities without prior approval of the SEC;
7. issue of senior securities such as preferred stock; and
8. issue of excessive debt.³⁰

Needless to say, each and every one of these prohibitions was violated, but the activity was not unlawful because the Investment Company Act was determined to be not applicable. The Investment Company Act was passed to prevent exactly the abuses witnessed in the Penn Central situation. In retrospect, it must be concluded that the regulation of the ICC has been woefully inadequate with consequent injury to investors and to the traveling public.

2. *Alleghany Corporation*

More than any other single instance, the Alleghany Corporation highlights the "overlapping and underlapping" of jurisdiction over investment companies under the Investment Company Act of 1940 and the Interstate Commerce Act. Between 1956 and 1959 the SEC vigorously but unsuccessfully sought to extend its regulatory jurisdiction pursuant to the Investment Company Act over Alleghany Corporation. The action provided by Section 3(c)(9) and the order of the ICC that Alleghany was a carrier effectively thwarted the SEC in its endeavors. After the Supreme Court had determined that Alleghany should not be subjected to the conflicting jurisdiction of two regulatory agencies and that the statutory jurisdiction of the ICC appeared paramount, legislation was proposed to close the loophole. In appearing to oppose this legislation, counsel for Alleghany argued that the proposed legislation was, in effect, a bill of attainder because Alleghany was the only company which would be affected. Whether or not such was the case in 1959, there are enough companies besides Alleghany presently relying on Section 3(c)(9) to warrant closing this loophole.³¹

Alleghany was incorporated on January 26, 1929. It became one of the first companies to register with the SEC under the Investment Company Act of 1940 and it continued to be subject to the Act until

²⁹ It should be pointed out, however, that although the disposal of the Welsh could have been a basis for resuming the ICC's jurisdiction, it was concluded to control the Detroit, Toledo & Ironton Railroad Company and the Toledo, Peoria and Western Railroad Company, both common carriers by railroad.

³⁰ *Hearing on "Penn Central Transportation Company: Adequacy of Investor Protection" before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess. 10-11 (1949).*

³¹ For example, International Utilities Corporation, which was represented on the Board of Directors of Penn Central, obtained an order to continue its status as an investment company subject to the Investment Company Act of 1940 as a result of its acquisition by Pabco by Hyder Truck Lines. SEC Investment Company Act Releases Nos. 439 and 475.

October 4, 1945. At that time, the SEC terminated Alleghany's registration as an investment company because as a result of its acquisition of control of Chesapeake and Ohio Railway Company it had become subject to regulation under the Interstate Commerce Act and had thus ceased to be an investment company by reason of Section 3(c)(9) of the Act which excludes from the definition of investment company any company subject to regulation under the Interstate Commerce Act.¹⁶²

At that time, 86 percent of Alleghany's total assets of \$83 million were invested in securities of carriers and only about 5 percent in securities of non-carrier issuers.

In 1959, Alleghany acquired control of Investors Diversified Services, which is now the largest mutual fund complex in the United States with assets in excess of \$6 billion. In 1955, Alleghany acquired control of the New York Central Railroad but continued its policy of investing in non-ICC regulated securities so that by 1959 only 22 percent of its assets were invested in carriers. This policy, interestingly enough, also included a significant investment in Manufacturers Hanover Trust Co.

Following the completion of the Penn Central merger on February 1, 1968, Alleghany and its related interests constituted the single largest block of stockholders in Penn Central's common stock.¹⁶³ Thereafter, Alleghany asserted it continued to hold carrier status until that status was revoked by the ICC and, therefore, it considered itself excluded from the definition of an investment company by reason of Section 3(c)(9). Recognizing, however, it was no longer in control of a carrier, Alleghany registered with the SEC as an investment company on April 10, 1968. It stated in its registration statement that it was registering under the Act to eliminate any uncertainty that might exist as to its status as a company subject to regulation under the Interstate Commerce Act and to eliminate any possibility of liability for doing business as an unregistered investment company.

Alleghany then embarked upon a series of transactions intended to remove the company from under the provisions of the Investment Company Act. On September 1, 1969, Alleghany entered into an agreement whereby it bought virtually all of the outstanding stock of Jones Motor Co., Inc., a motor carrier subject to ICC regulation. Because the transaction required ICC approval, all the shares of Jones purchased by Alleghany were deposited in a voting trust with Marine Midland Grace Trust Co. of New York as "independent voting trustee."

In registering with the SEC, Alleghany had disclosed its intention to assume motor carrier status, but did not solicit and receive stockholder approval until April 25, 1969. Thus, approval was obtained only after Alleghany had already made its investment. Certainly, a question of effective stockholder approval is raised in view of the SEC's position in *The Equity Corporation*.¹⁶⁴

On January 27, 1970 the ICC authorized Alleghany to acquire Jones and the transaction was consummated on April 30, 1970. The ICC found that Alleghany's acquisition of control had clearly violated Section 5(4) of the Interstate Commerce Act but, nevertheless, found the acquisition to be "in the public interest." As in several other

¹⁶² As of April 8, 1971, Alleghany, its controlling stockholder and Investors Diversified Services had a combined holding of 46.6 percent of Penn Central stock and formed the largest single block.

¹⁶³ SEC Investment Company Act Release No. 6699.

similar situations, the ICC chose to overlook action by a carrier which might reasonably have been construed to be at least a misdemeanor under Section 10 of its Act. It rewarded the carrier for violating the Interstate Commerce Act by permitting it to retain an investment made in violation of law. Of course, at no point in its consideration of the acquisition did the ICC consider the effect upon investors because of a loss of regulatory control by the ICC. This illicit acquisition cost Alleghany approximately \$28.8 million. On a consolidated basis, this represented approximately 42.5 percent of its total assets, but it was sufficient to permit Alleghany to slip from under the regulatory controls of the SEC and fall within the pseudo-regulation of the ICC.

VIII. OTHER MATTERS AFFECTING INVESTOR SECURITY

In analyzing the adequacy of investor protections, as viewed by the ICC, the staff has concluded that because of their potential for injury to the public interest, certain other matters should properly be the subject of separate and more detailed study. Those matters include:

1. CONGLOMERATES

In March, 1969 the staff of the ICC submitted to the Commission detailed studies of the conglomerate merger activity within the rail and motor carrier industries. Among other things, the staff pointed to the Commission's power inherent in Section 20 as a potent means for controlling what was becoming a rapidly accelerating process of diversification. In this regard, the staff raised the point that—

✓ Management [of the conglomerate] may very well strip the carrier of additional assets, reducing it to a corporate shell and then dispose of it.

Ironically, the accuracy of this estimate has already been brought home with the announcement by NorthWest Industries of its intention to dispose of its transportation subsidiary, the Chicago and Northwestern Railway. The railroad had been the initial company around which the holding company was capitalized and launched. NorthWest Industries, as the parent holding company has availed itself of the tax benefits and credits of the subsidiary railroad to reduce its own tax liabilities without, apparently, any offsetting benefit to the railroad. Now, with a significant portion of the railroad's real estate investments sold off to maintain the company's dividend policy and the bulk of the tax advantages already written off, the railroad is for sale.

Although the ICC has prepared its conglomerate merger studies, it has not demonstrated an enthusiasm for implementing the staff's recommendations. The Commission sought and received in the Emergency Railroad Transportation Act of 1933 the authority to regulate holding companies, but when actually confronted with a patent violation of a significant prohibition in that legislation, it ignored the original legislative purpose and ratified the unlawful action.

Clearer public disclosures by conglomerates with intelligible and accurate breakdowns of gross and net incomes by product lines and lines of business are needed. A reporting system for conglomerates

B

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during the period of the trust. Prior to consummation of the transaction proposed herein, Alleghany shall submit for approval of the Commission a plan showing how it intends to effectuate such trusteeship. While undoubtedly the divestiture of Penn Central shares by the trustee may have certain tax consequences, i.e., either the sale will result in a profit or a loss, Alleghany may avoid the tax consequence by electing not to consummate the proposed transaction. Further, the record before us indicates that the trustee should experience little difficulty in disposing of 390,130 shares of Penn Central now owned by Alleghany. Contained in the affidavit of Fred M. Kirby, previously referred to, is the following statement:

15. As of April 9, 1969, the date of the aforesaid Application under §5, the total amount of the capital stock of Penn Central owned by the funds sponsored by DSC/Investors Diversified Services, Inc., was 1,125,000 shares or approximately 6.22% of the total amount outstanding, all of which were held for investment purposes only and not for purpose of control. As of this date (September 30, 1969), all but 394,900 of said shares, representing approximately 1.63% of the Penn Central capital stock outstanding, have been sold.

We will further require as a condition to approval that all interlocking directorates between Alleghany and Penn Central, its subsidiaries, and affiliates be terminated. Prior to consummation, a plan of such termination shall also be submitted to the Commission. This update is on R.R. Case No. 100-1100, 239. We will further, in accordance with Alleghany's suggestion, and our own independent evaluation of the situation, we shall require as a condition for consummation of the proposed that the trusteeship of Alleghany's McPac securities, as previously ordered by the Commission, be continued subject to the continuing jurisdiction of the Commission. The Commission in the future may either in response to a petition or on its own motion institute an investigation to determine whether the trust should be continued or whether Alleghany's divestiture of McPac securities should be required.

The Penn Central shares not owned by Alleghany, but controlled by Fred M. Kirby and Allan P. Kirby, Jr., as co-guardians of the property of their father, Allan P. Kirby, present a special problem. The 390,129 shares of Penn Central owned by Allan P. Kirby represent 1.62 percent of the outstanding Penn Central shares. While Fred M. Kirby and Allan P. Kirby, Jr., are by the terms of the conditions imposed relating to interlocking

newly issued common stock of Jones, and Jones will have no other capital stock outstanding.

One of the primary reasons presented by Alleghany for acquisition of the operating rights of Jones is to lessen its tax burden. Such burden arises from the fact that Allan P. Kirby, as of February 28, 1969, was the beneficial owner of 4,084,813 shares, or 56.21 percent of the outstanding common stock of Alleghany. Alleghany is, therefore, for Federal income tax purposes, considered a personal holding company since one person (less than 5 individuals) owns more than 50 percent of its stock and has "personal holding income," (60 percent or more of adjusted gross income consists of dividends and interest) and is therefore subject to a 70-percent penalty tax on the "undistributed personal holding income." Alleghany does not want to distribute all such income to avoid the tax. With Alleghany the recipient of the operating revenue generated by its Jones Motor Division, it alleges it would be an operating company rather than a holding company for Federal tax purposes. It could then retain and reinvest net earnings and would not be subject to the 70-percent penalty tax.

Evidence of past operations by Jones under its operating rights is reflected in an abstract of shipments showing all shipments transported in January 1969. The traffic handled consisted of a wide variety of commodities, showing service to points throughout Jones' authority.

In its verified statement filed on October 1, 1969, Alleghany stated that as of February 1, 1968, the date of the Penn Central merger authorized by the Commission in *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, Alleghany received and still holds 196,195 shares or 0.81 percent of the 24,104,705 shares outstanding of Penn Central stock. In addition, Allan P. Kirby, controlling stockholder of Alleghany, received and presently holds 390,130 shares or 1.62 percent of the outstanding Penn Central shares. Combining their interests, Alleghany and Kirby together own 2.43 percent of the outstanding Penn Central stock. Alleghany's shares in Penn Central are held in its own name but the Kirby shares are among those held in the name of Sigler and Company.

Alleghany is also the controlling shareholder of Investors Diversified Services, which serves as an investment advisor and distributor for a group of mutual funds. As of September 30, 1969, these mutual funds held 391,900 shares or 1.63 percent of the outstanding shares of Penn Central. Its alleged investment

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party to the application before the Commission would have had jurisdiction to approve the merger, citing *U. S. v. Marshall Transport Co.*, 372 U.S. 31. With the consummation of the Penn Central merger, it is alleged that the holdings of Alleghany and the Kirby family in Penn Central have decreased, as have their membership and influence on the board of directors. In regard to the question raised by the Commission as to whether Alleghany is affiliated with Penn Central within the meaning of section 5(6) of the act, Alleghany maintains that a mere minority stock ownership or minority representation on the board of directors alone does not give rise to section 5(6) affiliation. Instead, it is argued such relationship ordinarily arises from the existence of a financial or business relationship with the carrier. Alleghany alleges it has no commercial, financial, or other arrangements of any kind with Penn Central, has no control over Penn Central operations, and holds less than 10 percent of the seats on the Penn Central board. It is further alleged that since the investment in Jones is of almost equal value to that Alleghany already has in Penn Central there will be no economic motive to manage one in the interest of the other. If its argument that it is not affiliated with Penn Central within the meaning of section 5(6) is accepted, Alleghany points out the proviso of section 5(2)(b) of the act is not applicable.

As to whether acquisition of control of Jones is consistent with public interest, Alleghany claims that public interest includes not only direct benefits to the shipping public but also indirect benefits through strengthening of the financial condition of the carrier involved, leading to longrun economies for the public. It is readily admitted the original intention in acquiring Jones was to avoid classification as a personal holding company under the Internal Revenue Code and thus to conserve funds which would otherwise have to be paid under the penalty tax provision. Still, it is argued the funds so saved will be available for improvement of Jones' carrier operations. It is claimed that it is in the public interest to have the union of a company having substantial financial resources with a carrier allegedly having a large need for cash to successfully continue its service. It is alleged that Alleghany's tax savings will make available to Jones approximately \$8,815,000 between 1969 and 1973. This will allow Jones to improve plant and equipment and achieve a growth rate not possible without the help of a company such as Alleghany. In support of its position that it is in the public interest for a company to realize tax savings if passed on to the carrier being acquired, Alleghany cites *Quinn Freight Lines, Inc., Control and Merger*, 87 M.C.C. 257.

should be continued or whether Alleghany's divestiture of
institute an investigation to determine whether the trust
in response to a petition or on its own motion [it may]
securities be continued. The Commission noted "... either
tion, ordered that the trusteeship of Alleghany's Nopac
the Commission, as a condition to its authoriza-
333, decided January 27, 1970.

and Control Fixe Trucking Company, No. NC-F-1044, 103 MCC
Corporation - Control and Purchase - Jones Motor Co., Inc. -
a common carrier by motor vehicle, was approved. Alleghany
Alleghany's acquisition of the Jones Motor Company, Inc.,
In a prior proceeding before this Commission,
promote the public interest.
in Nopac, pursuant to the plan of reorganization, would also
the divestiture of Alleghany's security holdings

WILL PROMOTE THE PUBLIC INTEREST
THE TERMINATION OF ALLEGHENY'S
INTEREST IN NOPAC SECURITIES

XI

be received by each and every class of shareholder alike.
value, that "premium" is included in the consideration to
power to veto certain corporate actions) has any "premium"
Alleghany's majority position (which carried with it the
share that Alleghany will receive. To the extent that

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MoPac securities should be required." Alleghany Corporation
- Control and Purchase - Jones Motor Co., Inc. - and Control
Erie Trucking Company, supra, at 350.

Undoubtedly the Commission, in so ordering, weighed the unique characteristics of MoPac Class B stock, including the absence of a broad and liquid market for that security. (See Exhibit #2, Testimony of F. L. Lee Jones.) The Commission was undoubtedly aware that the sale of Alleghany's B shares in the usual way was simply impossible, and to so order would cause great financial injury to Alleghany as well as to the minority Class B stockholders, the price of whose stock would be substantially depressed by the forced sale of the controlling block of B shares.

Furthermore, it is clearly conducive to the public interest that the Commission be relieved of the obligation of overseeing this trust, while at the same time achieving a solution which will not harm Alleghany, which is also a carrier subject to the Commission's jurisdiction.

Clearly, an excellent procedure for eliminating or virtually eliminating Alleghany's ownership of MoPac B stock is that embodied in the Plan of Reorganization.

E

because the MOPAC Plan of Recapitalization has been made up by Mississippi and her lawyers, and they have hired mercenary experts, lawyers who get paid to testify in favor of MOPAC and Mississippi, and those who are not in agreement with the wishes of Mississippi are not hired to testify. If the ICC decides favorable for section 20a, the MOPAC and Mississippi benefit because the plan of recapitalization has been slanted to be in their favor. Mississippi is MOPAC; Mississippi is the management. The yellow proxy even says that "this proxy is solicited on behalf of the management."

On page 36

Mr. Walton talks about the \$16 million dollars net left for the Class "B", and capitalizing that, he finally comes up with his fact that Class "B" is worth \$2,450...page 37, lines 2, 3 - But Mr. Walton, a railroad lawyer that he is, is forgetting that in addition to the worth of Class "B" of \$2,450 per share based on earnings, there is left out the fact that Class "B" has, as of December 31, 1972, retained income of \$349,192,000, or approximately \$8,775 per Class "B", which belongs to Class "B", because ^{RETAINED} net income is in addition to the assets necessary to satisfy all liabilities of the MOPAC railroad, including the \$100 per share liquidating value of the Class "A" in the event of liquidation. So all of this \$349,192,000 retained income of MOPAC, as of December 31, 1973, belongs to the Class "B" stock. This value

of \$2,450 per Class "B", when added to the about \$8,775 retained income which belongs to Class "B", amounts to \$11,225 value per Class "B".

\$11,225 per Class "B" value. There are additional property values for B.

At December 31, 1972 and 1971, according to the Mopac 1972 Annual Report on page 21, Consolidated non-depreciable properties, including land and land rights were approximately \$545 millions. This \$545 millions is arrived at in the following manner. These valuations are as of 1954 plus additions and betterments less depreciation to December 31, 1972. Since the year of 1954 inflation has more than doubled the value of this property, or approximately \$1,030 Millions. One half of this accrues to the Class B, which according to the Mopac I.C.C. Agreed Plan of 1955 Reorganization the Class B is the recipient of all corporate equity after all debts have been satisfied, including the \$100 per share liquidating value of the Class A. One half of \$1030 Millions equals \$515,000,000.

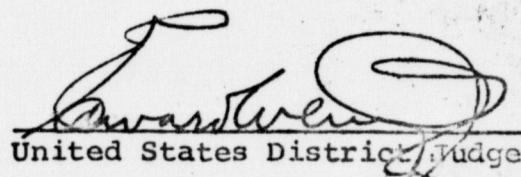
Therefore Class B has increased in value	\$545,000,000.
Consolidated Retained Income December 31, 1972	<u>\$849,192,000</u>
Total value accrued to Class B	<u>\$894,192,000</u>
This amount divided by say 40,000 shares Class B	
equals approximately \$22,350 per Class B	
Plus times earnings	
of Class B based upon	
earnings according	
to Mopac	2,450
Total value	\$24,800 per Class B Mopac stock

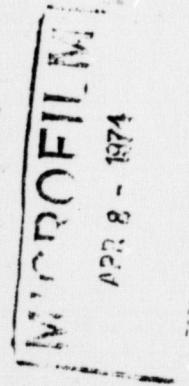
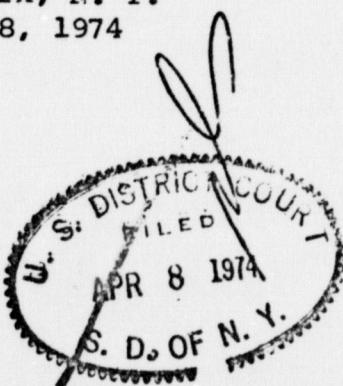
One of the solutions to this Mopac problem is to have the United States District Court in Saint Louis help the I.C.C. enforce the Mopac Agreed Plan of Reorganization which is a law of the United States because it was approved and certified both by the I.C.C. and the United States Federal District Court in Saint Louis. The other solution would be to have it resolved under Section 20b.

67 Civil 5095

This motion is without merit. The holding and rationale of Zahn v. International Paper Co., 42 U.S.L.W. 4087 (U.S., Dec. 17, 1973), is applicable to class actions under Fed. R. Civ. P. 23(b)(3); as plaintiffs correctly point out, this suit was certified as a class action under Fed. R. Civ. P. 23(b)(1) and (2). Further, jurisdiction for this action was grounded on section 27 of the Securities Exchange Act of 1934, 15 U.S.C., section 78aa (1970), and pendent jurisdiction. See Levin v. Mississippi, 59 F.R.D. 353, 359-60 (S.D.N.Y. 1973). Section 27 does not require a minimum amount in controversy, and Zahn is not applicable to suits brought thereunder. See Zahn v. International Paper Co., 42 U.S.L.W. 4087, 4091 n. 11 (U.S., Dec. 17, 1973). Finally, after the Supreme Court had denied certiorari in the instant case, the petitioner applied for a rehearing based on the Zahn case, and the petition was denied.

Dated: New York, N. Y.
April 8, 1974


United States District Judge



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN, ALLEGHANY CORPORATION x
AND ROBERT LEVASSEUR,

Plaintiffs, x
-against-

MISSISSIPPI RIVER CORPORATION, x
MISSOURI PACIFIC RAILROAD COMPANY, x
ROBERT H. CRAFT, T. C. DAVIS AND x
THOMAS F. MILBANK,

Defendants x

67 Civ. 5059 (EW)

PETITION

Napoleon C. Gabriel, being duly sworn, petitions this court and deposes and states as follows:

(1) That he resides at R D #2, Rt. 33, Freehold, New Jersey 07728, and is an owner of only five certificates of Class B stock of the Missouri Pacific Railroad Company (Mo Pac).

(2) That this honorable court, in its order and final judgment dated and entered May 2, 1973, retained "jurisdiction of all matters respecting the consummation of the settlement of this action pursuant to the Stipulation of Settlement and for the purposes of entertaining applications for attorneys' fees and expenses by counsel for plaintiffs Betty Levin and Robert Le Vasseur and by plaintiff Alleghany Corporation".

RELIEF SOUGHT

(3) Petitioner, in light of ZAHN v. INTERNATIONAL PAPER COMPANY, U.S. Sup. Ct. decided December 17, 1973, claims that this court had no jurisdiction over him, or those similarly situated because petitioner and approximately 76.1% of the

Class B stockholders as of May 1, 1973, lacked the jurisdictional amount necessary for this court to make a judgment binding them as a class.

Wherefore, petitioner respectfully requests this court to so amend its final judgment of May 2, 1973, approving the settlement agreement in this action, dated December 18, 1972, so as to make it clear that neither the judgment or the settlement agreement are binding on petitioner and those similarly lacking the jurisdictional amount (Title 28 USC 1332); and further that with the reduction of the class that the fees of counsel to be paid by Mo Pac be substantially reduced in proportion to the reduction of the class represented.

Dated: February 15, 1974 Respectfully submitted,

Napoleon C. Gabriel
Napoleon C. Gabriel

Napoleon C. Gabriel

I, the undersigned attorney, duly admitted to practice in the United States District Court, Southern District of New York, that on February 15, 1974, at Newark, New Jersey, Napoleon C. Gabriel affixed his above signature before me.

Gerard H. Carey
Gerard H. Carey

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN, ALLEGHANY CORPORATION x
AND ROBERT LEVASSEUR,

Plaintiffs, x

-against-

x 67 Civ. 5059 (EW)

MISSISSIPPI RIVER CORPORATION, x
MISSOURI PACIFIC RAILROAD COMPANY, x
ROBERT H. CRAFT, T. C. DAVIS AND
THOMAS F. MILBANK, x

PETITION

Defendants x

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Napoleon C. Gabriel
Napoleon C. Gabriel

Napoleon C. Gabriel

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Gera M. Carey
Gera M. Carey

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIOT LEVIN, ALLEGHENY CORPORATION,
AND ROBERT LEVASSER,

Plaintiffs, x
against-

67 Civ. 5059 (EW)

MISSISSIPPI RIVER CORPORATION x
MISSOURI PACIFIC RAILROAD COMPANY
ROBERT M. CRAIG, T.C. DAVID AND
THOMAS F. MELBANK, x

SUPPLEMENTAL
PETITION

Defendants x

8
Napoleon C. Gabriel, being duly sworn, deposes
and says:

(1) That he adds the following grounds to his
motion dated February 15, 1974 as added grounds that
the relief that he and other class B stockholders of
Mo Pac similarly situated be relieved from the judgment
of this Court dated May 2, 1973.

(2) That said added grounds are as follows:

to approve the stipulation of settlement of the above-

captioned action on the grounds that:

- I. The settlement being no fraud and alien to the cause of action presented in the pleadings it was violative of Rule 41 of the Federal Rules of Civil Procedure;
- II. Alleghany's certification of Class B stock holder's interest under the continental jurisdiction of the Interstate Commerce Commission, Alleghany was not a real party

ONLY COPY AVAILABLE

in interest for the settlement of the said suit and was not representative of the Class purported to be represented; and that the judgment was violative of the petitioner's rights to due process of law.

Dated: March 18, 1974

Napoleon C. Gabriel
Napoleon C. Gabriel

State of New Jersey
County of Monmouth

On this 20th day of March, 1974, Napoleon C. Gabriel known to me appeared before me and affixed his signature to above after having been duly sworn.

George D. Edwards

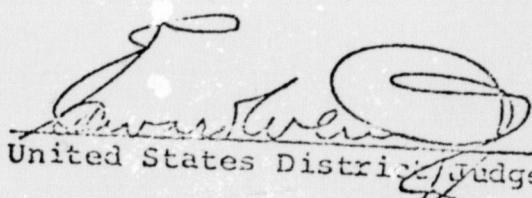
GEORGE D. EDWARDS
NOTARY PUBLIC, STATE OF NEW JERSEY
My Commission Expires Nov. 24, 1974

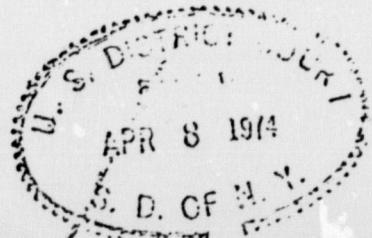
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67 Civil 5095

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Dated: New York, N. Y.
April 8, 1974


Alexander T. Karp
United States District Judge



LEVIN v. MISSISSIPPI RIVER CORPORATION
Cite as 56 F.R.D. 284 (1973)

In any case, however, this conditional privilege with regard to advisory opinions does not extend to factual reports and summaries. . . . 54 F. R.D. at 12 [Citations omitted].

plaintiff's Motion be made available for inspection and copying subject to the limitations specified above.

It is so ordered.

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[9] Applying these guidelines to the instant case, it is clear that all of the documents specified in item 1 of Plaintiff's Motion for Order Requiring Production of Documents for Inspection and Copying (arrest reports, follow-up reports and closing reports concerning plaintiff's arrest) should be disclosed. In view of plaintiff's acquittal on the reckless driving charges filed against him,¹² it is obvious that the investigation has been completed. However, disclosure is limited to factual data. If the City believes that portions of the police reports contain evaluative summaries or recommendations that should not be discovered, the reports may be submitted to the court for *in camera* inspection prior to delivery to plaintiff.

[10] With respect to item 2 of plaintiff's Motion (reports prepared in connection with any interdepartmental investigation of the complaint filed against the Department by plaintiff), discovery will be denied at this time. Counsel for the City has stated that this investigation is not yet completed and that there is a possibility of interdepartmental disciplinary proceedings arising from the investigation. However, plaintiff may renew his motion at an appropriate time if reasonably necessary for the prosecution of his case.

[11] Item 3 of plaintiff's Motion (all documents "which relate in any way" to the arrest, detention and booking of plaintiff or to his complaint against the Department) is denied as too broad, but with leave to renew if appropriate.

Accordingly, it is the judgment of this court that (1) the City be dismissed as a party in this proceeding, and (2) that the documents specified in item 1 of

Betty LEVIN et al., Plaintiffs,
v.
MISSISSIPPI RIVER CORPORATION et al., Defendants.
No. 67 Civ. 5095.

United States District Court,
S. D. New York.
March 19, 1973.

Motion was filed for approval of settlement agreement in a stockholders' class and derivative action. The District Court, Edward Weinfeld, J., held, *inter alia*, that settlement of the action, which arose from conflict between two classes of stockholders in railroad corporation, would be approved in light of benefits to be derived by the railroad in improving its competitive position and by the plaintiff class of stockholders in securing return on their investment, and in light of analysis of the probability of success on trial; prospect that settlement would eliminate the underlying conflict, which could not be eliminated at trial; judgment of the parties, who included a majority of each class, that terms of settlement were fair; and fact that approval by a majority of the minority shareholders of each class was required by the terms of the settlement.

Settlement approved.

See, also, D.C., 47 F.R.D. 294.

1. Federal Civil Procedure 1699
Function of court
approval of settleme

lication for
stockholders'

12. See footnote 2, *supra*.

class and derivative action was not to re-open and enter into negotiations with the litigants in the hope of improving the terms of the settlement to meet objections nor to substitute its business judgment for that of the parties, but to determine whether settlement was fair, reasonable and adequate as to the stockholder class and the corporation. Fed. Rules Civ. Proc. rules 23, 23.1, 28 U.S.C.A.

2. Federal Civil Procedure \Leftrightarrow 1699

Court, on application for approval of settlement of stockholders' class and derivative suit, was not to turn settlement hearing into a trial or a rehearsal of trial nor to make an actual determination of the facts and the law but to form an educated estimate of the complexity, expense and likely duration of the litigation and to compare the terms of the compromise with the likely rewards of the litigation. Fed. Rules Civ. Proc. rules 23, 23.1, 28 U.S.C.A.

3. Federal Civil Procedure \Leftrightarrow 1699

Settlement of stockholders' class and derivative action, which arose from conflict between two classes of stockholders in railroad corporation, would be approved in light of benefits to be derived by the railroad in improving its competitive position and by the plaintiff class of stockholders in securing return on their investment, and in light of analysis of the probability of success on trial; prospect that settlement would eliminate the underlying conflict, which could not be eliminated at trial; judgment of the parties, who included a majority of each class, that terms of settlement were fair and fact that approval by a majority of the minority shareholders of each class was required by the terms of the settlement. Fed. Rules Civ. Proc. rules 23, 23.1, 28 U.S.C.A.; Interstate Commerce Act, §§ 5(2), 20a, 49 U.S.C.A. §§ 5(2), 20a.

4. Federal Civil Procedure \Leftrightarrow 1699

An important, if not the most important factor in determining whether

to approve settlement of stockholders' class and derivative action is; the chance of plaintiffs' success upon trial and if successful, the likely rewards of the litigation. Fed. Rules Civ. Proc. rules 23, 23.1, 28 U.S.C.A.

5. Corporations \Leftrightarrow 320(11)

Class B shareholders had the burden of proving their claim, in class action, that corporation's board of directors, in subservience to the wishes of the majority class A shareholder, abused their discretionary powers and arbitrarily and unreasonably withheld dividends on the class B shares, though corporation's condition warranted additional dividends.

6. Corporations \Leftrightarrow 152

Determination of whether dividends are to be declared rests in first instance with the board of directors, and courts may intervene only when there has been bad faith, neglect or abuse of discretion; it is not sufficient for stockholders to show that substantial earnings were available to pay a higher dividend than was declared.

7. Federal Civil Procedure \Leftrightarrow 1699

Contention by directors, in class action by class B shareholders, that failure to declare larger dividend on class B shares was based on prudent business judgment in light of large cash expenditures needed to maintain corporation's competitive standing raised a substantial issue to be taken into account on application for approval of settlement. Fed. Rules Civ. Proc. rule 23, 28 U.S.C.A.

8. Corporations \Leftrightarrow 310(1)

Directors are permitted a very liberal discretion in determining matters of business policy, and if that discretion has been exercised in good faith, it will not be disturbed even though it may have been injudicious or though court may believe that a different policy was desirable.

9. Securities Regulation \Leftrightarrow 143

Class B shareholders who alleged that certain class A shareholders violated

LEVIN v. MISSISSIPPI RIVER CORPORATION
Cited in 50 F.R.D. 231 (1969)

the Securities Exchange Act by buying and selling shares of class B stock to depress the market of such stock, thereby forcing plaintiffs to sell at prices much below true value thereof, had burden of proving that defendants' actions were fraudulent or unjustified, and that such conduct in some way caused plaintiff's injury. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

10. Federal Civil Procedure \Leftrightarrow 1699

Though final judgment as to fairness of proposed settlement of stockholders' class and derivative action was responsibility of court, joint recommendation of the parties, their attorneys, and their investment advisers was entitled to substantial weight, particularly where, *inter alia*, one of the plaintiffs was the owner of 53% of the stock in the plaintiff class and the other plaintiffs also owned substantial numbers of shares of such stock and their counsel acted independently of counsel for majority shareholder plaintiff in representing the interests of the minority shareholders. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

11. Federal Civil Procedure \Leftrightarrow 1699

The parties are permitted great freedom in shaping the form of settlement consideration in a stockholders' class and derivative action. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

12. Federal Civil Procedure \Leftrightarrow 1699

Fact that comparatively small number of holders of shares reflecting a small percentage of the total outstanding shares in the plaintiff class opposed settlement of stockholders' class and derivative action, as against a great majority who favored it, did not relieve court of its function in passing on the fairness of the proposal. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

13. Federal Civil Procedure \Leftrightarrow 1699

Proposed settlement of stockholders' class and derivative action, which arose from dispute between plaintiff class B shareholders and the class A sharehold-

ers, who had operating contract which provided for an exchange of stock as part of the settlement was not shown to be unfair despite contention of objectors that value of cash and shares of common stock to be received by holders of class B stock was substantially less than the value of the shares to be surrendered and that the cash element of the exchange formula would have income tax disadvantages to the minority B shareholders. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

14. Federal Civil Procedure \Leftrightarrow 1699

In passing on proposed settlement of stockholders' class and derivative action, which settlement involved recapitalization, court was not called upon to make a definitive assessment of the value of each class of stock, old or new, but to determine whether the terms of the settlement, taking into account the probabilities of success upon a trial, and all other pertinent factors, were fair, reasonable, and adequate. Fed.Rules Civ. Proc. rules 23, 23.1, 28 U.S.C.A.

15. Federal Civil Procedure \Leftrightarrow 1699

In passing upon proposed settlement of stockholders' class and derivative action involving a railroad corporation, the standard of "fair, reasonable and adequate" was not to be equated with the standard of "fair and equitable" applicable to a proposed railroad reorganization under the Bankruptcy Act; in the compromise of a stockholders' lawsuit, there necessarily come into play practical adjustments. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.; Bankr.Act, § 77, 11 U.S.C.A. § 205.

See publication Words and Phrases for other judicial constructions and definitions.

16. Evidence \Leftrightarrow 601(4)

In valuing shares of stock, the terms "equity" and "book value" are essentially synonymous.

See publication Words and Phrases for other judicial constructions and definitions.

17. Federal Civil Procedure \Leftrightarrow 1699

In passing upon proposed settlement of stockholders' class and derivative action, which settlement involved a recapitalization, book value was of little significance in appraising the value of stock to be surrendered by the plaintiff class. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

18. Federal Civil Procedure \Leftrightarrow 1699

For purposes of valuing stock in connection with proposed recapitalization as part of a settlement of stockholders' class and derivative action, market evaluation of stock may reflect a more realistic appraisal of its value than a conceptual evaluation: theory must yield to the reality of the market place.

19. Federal Civil Procedure \Leftrightarrow 1699

Contention of class B stockholders who opposed settlement of stockholders' class and derivative action, which involved recapitalization, that the market price of their stock had been depressed by the acts of the defendants did not preclude consideration of such market price in determining the fairness of the settlement since the consequence of defendants' alleged conduct was one of the issues which would have to be decided were the case to go to trial. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

20. Federal Civil Procedure \Leftrightarrow 1699

When court is called upon to decide whether settlement reached by litigants in stockholders' class and derivative action is fair and reasonable, question of whether rejection of alternative proposals by one or another of the parties was justified is not before the court. Fed. Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

21. Federal Civil Procedure \Leftrightarrow 1698

Notice of proposed settlement of stockholders' class and derivative action, which was mailed to each registered stockholder and published in national business newspaper, and which informed interested stockholders of the nature of the pending action, the general terms of

the settlement, that complete and accurate information was available from the files of the court, and that any stockholder could appear and be heard, was sufficient. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

Orans, Elsen & Polstein, Pomerantz, Levy, Haudek & Block, New York City, for plaintiffs Levin and LeVasseur; Sheldon H. Elsen, Abraham L. Pomerantz, John Lowenthal, William E. Haudek, Lewis Shapiro, New York City, of counsel.

Donovan, Leisure Newton & Irvine, New York City, for plaintiff Alleghany Corporation; John E. Tobin, M. Lauck Walton, Theodore E. Somerville, Glenn S. Koppel, New York City, of counsel.

Dewey, Ballantine, Bushby, Palmer & Wood, New York City, for defendant Mississippi River Corp.; Everett I. Willis, Robert S. Wolf, Gerald E. Ross, New York City, of counsel.

Sullivan & Cromwell, New York City, for defendants Missouri Pac. R. Co., Robert H. Craft, T. C. Davis and Thomas F. Milbank; David W. Peck, Michael M. Maney, Carroll E. Neesemann, New York City, of counsel.

Greenbaum, Wolff & Ernst, New York City, for Class B Objectors Edward Garfield and Barbara M. Garfield; Barron M. Tenny, Edward Garfield, New York City, of counsel.

Sixteen Other Class B Objectors, pro se.

Michael Paul Cohen, Chicago, Ill., for Class A Objectors Jacob R. Cohen and June Cohen.

EDWARD WEINFELD, District Judge.

This is a motion pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure for approval of a settlement agreement of a class action brought on behalf of Class B stockholders of the Missouri Pacific Railroad Company

LEVIN v. MISSISSIPPI RIVER CORPORATION
Cite as 30 F.R.D. 323 (1954)

(MoPac), an interstate railroad. The plaintiffs in the class action are Alleghany Corporation (Alleghany), the owner of a majority of the outstanding shares of Class B stock, and two individual owners of such stock, Betty Levin (Levin) and Robert LeVasseur (LeVasseur), who also assert derivative claims on behalf of and in the right of MoPac. The defendants include Mississippi River Corporation (Mississippi), the owner of a majority of the outstanding Class A stock of MoPac, and three individual defendants, directors of MoPac, two of whom are also directors of Mississippi. In the event the proposed settlement is approved, applications for allowance of attorneys' fees and expenses are to be considered following entry of final judgment.

HISTORICAL BACKGROUND
OF THE CLASS A AND
CLASS B STOCK

The capitalization of MoPac has been the subject of controversy and litigation for almost forty years. The Class A and Class B stockholders have been at odds over their respective rights and interests over a substantial period. Their differences were accentuated by MoPac's restructured capitalization when in 1956 it emerged from reorganization proceedings filed in 1933. During those twenty-three years various proposed plans of reorganization failed to gain acceptance. Alleghany Corporation, the owner of about half of MoPac's then outstanding

1. Missouri Pac. R. R. Reorganization, 290 I.C.C. 477 (1954), approved in *In re Missouri Pac. R. R.*, 129 F.Supp. 392 (E.D.Mo.), aff'd sub nom. *Missouri Pac. R. R. 5 1/4% S.S.B.C. v. Thompson*, 225 F.2d 761 (8th Cir. 1955), cert. denied, 350 U.S. 959, 76 S.Ct. 347, 100 L.Ed. 833 (1956).
2. In re Missouri Pac. R. R., 129 F.Supp. 392, 397 (E.D.Mo. 1955). ICC Commissioner Mahaffie was the first to predict trouble ahead. In his reluctant concurrence of the reorganization plan, he said:

common stock, had extensive reorganization plans proposed in 1947, 1948, and 1949 because none provided for the common stockholders. Finally, a plan, referred to as an "Agreed System Plan," was proposed by the reorganization Trustee, approved by the Interstate Commerce Commission in 1954, accepted by Alleghany and other interests, and became effective March 1, 1956.¹ The plan, which then seemed to be an ingenious way to compose differences among various security and equity interests, contained provisions which some objectors predicted "are sure to cause trouble."² And so it has come to pass. The equity interests have been at odds and in litigation ever since.

MoPac's recapitalization upon its reorganization was structured so that the old preferred and common stock were replaced by two classes of stock, Class A and Class B. The Class A shares of the reorganized company were issued to the former preferred stockholders of MoPac, the debtor, with each share entitled to receive, when and as declared by the Board of Directors, noncumulative dividends, not to exceed \$5 annually, and in the event of dissolution or liquidation, the first \$100, together with any dividends declared and unpaid. The Class B shares were issued to the former common stockholders of the debtor, and after payment of the \$5 dividend to the Class A stock, each share of Class B stock is entitled to receive dividends, without restriction, as the Board of Directors may

"The prior class 'A' stock is limited as to dividends and is noncumulative. It will be largely of a speculative character for some years at best. But the 'B' stock is for the present, and for the foreseeable future, principally valuable as a token for speculation. Consequently, its relation to the 'A' stock and to the debentures and income bonds which precede it is reasonably sure to cause trouble."

Missouri Pac. R. R. Reorganization, 290 I.C.C. 477, 624-25 (1954).

declare, and upon liquidation or dissolution of MoPac, the equity in excess of the Class A preferences. Each share of each class is entitled to one vote. The former preferred stockholders received approximately 1.9 million shares and the former common stockholders received approximately 40,000 shares, so that 98% of the voting stock is held by the Class A stock and 2% by the Class B stock.

Obviously, the Class A stockholders have the power to elect MoPac's Board of Directors, as well as voting control with respect to other but not all corporate matters. On mergers, consolidations or reorganizations involving issuance of additional stock or the alteration of the rights of either class, approval by a majority of each class is required. Thus, in effect, the Class B stock has a veto power over such actions. In practical terms, the "ingenious" solution envisaged under the 1956 reorganization created a basic conflict between the two classes, with the equity ownership principally in the B stock, but with effective operating control in the A stock.

Mississippi began acquiring Class A stock in 1959 and by 1963 owned more than one million shares, constituting 58% of the outstanding Class A shares. It now owns 63%, or 1,158,395 shares out of a total outstanding of 1,864,052. Since 1963 it has elected the Board of Directors of MoPac. Alleghany, on the other hand, which has owned a majority of the outstanding Class B stock ever since it was issued upon the reorganization, now owns, subject to a voting trust, approximately 53%, or 21,243 shares, of the total outstanding 39,731 shares. Thus the disparity of interest between the two classes of stock is further aggravated by Alleghany's majority ownership of the B stock, which gives it an independent veto power over any corporate action that requires the separate approval of the B stock.

THE VOTING LITIGATION

The first litigation that the two classes of stockholders became embroiled in after the reorganization came in December 1963, when MoPac's Board of Directors proposed the consolidation of MoPac and its 83% owned subsidiary, Texas and Pacific Railway Company (T & P), into a new corporation, Texas and Missouri Pacific Railroad Company (T & M). An application was filed with the Interstate Commerce Commission for an order under section 5(2) of the Interstate Commerce Act authorizing the proposed consolidation and for the issuance of securities by T & M under section 20a of the Act. The plan provided for an exchange of each MoPac share, regardless of class, for four shares of the new corporation and for an exchange of the T & P stock (other than that owned by MoPac) on the basis of one share of T & P for 4.8 shares of the new company. MoPac's Board of Directors took the position that the Class B stockholders were not entitled to vote on the plan separately and apart from the Class A stockholders, and that it intended to submit the plan for approval to the collective vote of the Class A and Class B stockholders. In view of Mississippi's ownership of a majority of the Class A stock, as well as all outstanding stock, the outcome of the vote on consolidation was virtually foreordained. Alleghany and other Class B stockholders filed actions in the United States District Court for the Eastern District of Missouri for a declaratory judgment that the plan required the approval of a majority of each of the two classes of stock and sought other relief. Upon a limited consolidation of the cases the district court held that MoPac's Articles of Association and the applicable federal and state law required the separate approval of each class of shareholders.³ The Court of Appeals reversed, holding that separate class ap-

3. *Slayton v. Missouri Pac. R. R.*, 233 F.Supp. 747 (E.D.Mo.1964).

10 FEDERAL RULES OF PRACTICE

Attorneys' and framers' counsel fees incurred in the prosecution of this action.

In addition to the class action claims, Levin and LeVasseur separately assert derivative claims on behalf of MoPac. One alleges that the defendants have failed to cause MoPac to replace the Class A stock with debentures or other interest bearing securities, which would materially reduce MoPac's income tax; however, as to this derivative claim, no specific relief is sought. A further derivative claim on behalf of MoPac is for the recovery of the costs and expenses incurred by it in connection with the 1963 T & P consolidation plan and the Class B voting rights action.

* The defendants in their answers have denied the material allegations of the complaints and set up affirmative defenses, including, with respect to the dividend cause of action, business justification.

With the issues thus posed, the parties engaged in extensive pretrial discovery procedures commencing in 1968. The case was assigned to this Court in mid-year 1972, and after a pretrial conference the trial was scheduled to commence on December 4, 1972. As the trial date approached, the litigants had virtually completed all pretrial activities, which included depositions of parties and witnesses, as well as interrogatories propounded to one another, which in due course were answered. In addition, plaintiffs had obtained, read and evaluated approximately 10,000 pages of documents from the files of MoPac and related sources. The inspection of these documents took over ninety man-days' work by plaintiffs' counsel and additional time by an accountant and securities expert, retained specially for that purpose. It is evident that the pretrial discovery on both sides was as thorough as could be and all pertinent facts exposed by the litigants in preparation for a contested trial. While engaged in concluding their expanded pretrial activities, the parties concurrently intensified efforts

to effect an amicable and early closing of the case. This was done and even before attorney's fees and accommodation had failed. The extended negotiations were conducted in not only by the lawyers representing the parties, executives and financial officers of the corporations, but also by independent financial analysts and investment advisers specializing in corporate and transportation finance. The negotiators recognized that due to a lasting resolution of the conflict between the two stockholder interests was the elimination of the underlying cause of the strife, a result not obtainable whatever the final outcome were the case to proceed to trial, and it was this concept which led to a settlement on the basis of a restructured capitalization.

THE TERMS OF THE PROPOSED SETTLEMENT

If the settlement is approved by the Court, a Plan of Recapitalization (Plan) and a proposed Amendment to MoPac's Articles of Association are to be submitted to stockholders for their approval, to bring about the following:

(1) each share of Class A stock would be converted into one share of \$5 cumulative preferred stock, with a liquidating preference of \$100 per share, convertible into one share of new common after one year following ICC authorization of the issuance of new securities and redeemable at the option of MoPac for \$100 per share, after December 31, 1975. This would require the issuance of 1,864,052 shares of the new stock to the present holders of the Class A stock, of which Mississippi would be entitled to receive 1,158,395 shares;

(2) each share of Class B stock would be converted into sixteen shares of new common stock and \$850 cash. This would require the issuance of 635,696 shares of new common stock to the present holders of Class B stock, of which Alleghany would be entitled to receive 339,-

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Approval was not required.⁴ On certiorari, the Supreme Court unanimously reversed the Court of Appeals, holding that:

"With reference to voting rights, we hold only that in a consolidation as proposed here, Missouri law must be applied and . . . that law requires the application of the Articles of Association of MoPac, which in turn, require the assent of the majority of the shareholders on a separate class-vote basis."⁵

Since a number of stockholders emphasize certain rhetorical statements in the Court's opinion,⁶ it is well to bear in mind the Court's precise holding, and further its statement: "We do not . . . reach the merits of the proposed plan . . .".⁷ The Court's ruling ended the proposed consolidation when in March 1967 MoPac and T & P abandoned their plan, but further litigation was ahead.

THE INSTANT ACTION

This action was instituted by plaintiff Levin in December 1967. Thereafter Alleghany and LeVasseur intervened pursuant to leave granted by this Court. In September 1968 Judge Bryan ordered that the action be maintained as a class action on behalf of all Class B stockholders. The thrust of the complaints of all three plaintiffs is directed toward the dividend policy with respect to the Class B stock. From 1964 to 1971 the annual dividends paid on the A stock have been \$5 per share. During that same period annual dividends declared and paid on the Class B stock have been \$5 per share.

In substance, three separate claims are asserted against Mississippi and the

three defendants. The first cause of action charges that the dividends paid on the A stock by MoPac have been unreasonably low. Mississippi has misused its majority voting stock power by causing MoPac's Board of Directors to limit dividends on the Class B stock to \$5, the maximum permissible per share dividend paid on the Class A stock, despite the enormous differences in the equity value between the two classes, and notwithstanding the availability in each year of net income for increased dividends after meeting the requirements on the Class A stock.

The second cause of action charges a conspiracy by Mississippi and members of MoPac's Board of Directors to "freeze out" the Class B stockholders by improperly limiting the dividends paid on the Class B stock, making public statements denigrating the market value of the Class B stock, and attempting to appropriate the equity of the Class B stockholders through the plan of consolidation of MoPac with T & P, proposed in 1963.

The third cause of action further alleges that the various acts and conduct alleged in the second cause of action were in violation of section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5, promulgated thereunder, and of defendants' common law fiduciary duty owed the Class B stockholders. The plaintiffs seek judgment that the Court direct MoPac to pay reasonable dividends for the past years, from 1964 to 1971, to all Class B stockholders; that MoPac be directed to pay reasonable dividends on the Class B stock in the future; and to award plaintiffs their costs,

4. *Mississippi River Fuel Corp. v. Slayton*, 359 F.2d 106 (5th Cir. 1966).
5. *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 179, 87 S.Ct. 927, 932, 17 L.Ed.2d 834 (1967).
6. *See, e. g., id.* at 169, 87 S.Ct. at 931: "The plan proposes to exchange four shares of stock of T & M for one share of MoPac Class B, which . . .

is like exchanging four rabbits for one horse."

7. *Id.* at 170, 87 S.Ct. at 932.
8. Plaintiff Levin also attacks the failure of defendants to split the Class B stock or to take similar steps to improve its marketability; however, no specific relief is sought.

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*** shares; this would require a cash payment by MoPac of \$33,771.59;

(3) both preferred stock and common stock would have one vote per share;

(4) the Plan and amendment would have to be approved by 75% of the outstanding shares of each class of MoPac stock, including a majority of the shares of each class other than those held by Mississippi and Alleghany—that is, a majority of the minority stockholders of each class;

(5) the issuance of the new shares would have to be approved by the Interstate Commerce Commission;

(6) upon such approvals, Mississippi is required to make a cash tender offer to all Class B stockholders for at least 400,000 shares (approximately 63%) of the new common stock, at \$100 per share, and Alleghany (but not the minority B shareholders) must tender all its new common stock (339,888 shares). If more than 400,000 shares are tendered, Mississippi may purchase the shares on a pro rata basis; this would require a cash payment by Mississippi of at least \$40,000,000;

(7) all claims asserted in this action and any other claims against the defendants which are based upon or arise from any of the matters alleged in the complaints, regardless of the legal theory upon which they are based, will be dismissed with prejudice;

(8) fees awarded to plaintiffs' attorneys will be paid by MoPac and Mississippi.

If the recapitalization and tender offer are not consummated by December 31, 1973, the settlement agreement

9. *Schleiff v. Chesapeake & O. Ry.*, 43 F.R.D. 175, 178 (S.D.N.Y.1967); *Glickman v. Bradford*, 35 F.R.D. 144, 151 (S.D.N.Y.1964).

10. *Newman v. Stein*, 464 F.2d 689, 692 (2d Cir.), cert. denied *Benson v. Newman*, 409 U.S. 1029, 93 S.Ct. 521, 34 L.Ed.2d 485 (1972).

would be terminable at the option of Alleghany, Mississippi or MoPac.

EVALUATION OF THE SETTLEMENT

[1,2] The function of the Court on this application for approval of the settlement is not, as some objectors suggested at the hearing and others have since urged in their communications to the Court, to reopen and enter into negotiations with the litigants in the hope of improving the terms of the settlement to meet their respective objections; nor is the Court called upon to substitute its business judgment for that of the parties who worked out the settlement.⁹ So, too, the Court is cautioned not to turn the settlement hearing into a trial or a rehearsal of a trial.¹⁰ To do so would defeat the very purpose of the compromise to avoid a determination of the sharply contested issues and to dispense with expensive and wasteful litigation. The Court's role is a more "delicate one,"¹¹ which requires a balancing of likelihoods rather than an actual determination of the facts and law in passing upon whether the proposed settlement is fair, reasonable and adequate to the Class B stockholders and MoPac.¹² This appraisal requires the Court to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and to "form an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance . . . is the need to compare the terms of the compromise with the likely re-

11. *Id.* at 691; see also *United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co.*, 447 F.2d 647 (7th Cir. 1971).

12. See *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y.1971).

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year could have an economic interest in the declaration of dividends on the new common stock.

Other advantages are evident. The conversion of the Class B stock into sixteen shares makes them more marketable and to this extent meets the derivative claim that the defendants failed to split the Class B stock, thereby broadening public interest in it. Additionally, at the present time the Class B stock elects no directors. Under cumulative voting the new common stock would have the means of representation on the Board of Directors.

[4] We next consider a, if not the, most important factor—the probability of plaintiffs' success upon a trial, and, if successful, "the likely rewards of [the] litigation." The extensive pretrial discovery conducted by the parties has exposed their respective strengths and weaknesses.¹⁶ While each litigant professes confidence in his cause, it is with recognition of the force of a countervailing position and also, as all are aware, that "[s]tockholder litigation is notably difficult and unpredictable."¹⁷

[5-8] Plaintiffs have the burden of proof as to their claims. To prevail, they must establish under the allegations of their complaints that MoPac's Board of Directors, in subservience to the wishes of Mississippi, abused their discretionary powers and arbitrarily and unreasonably withheld dividends in each

year. Plaintiffs have failed to establish the determinative nature of their claims. The determination of whether dividends should be declared rests in the first instance with the Board of Directors. Courts may intervene only when there has been bad faith, neglect or abuse of discretion.¹⁸ This is indeed a heavy burden,¹⁹ which plaintiffs' experts themselves frankly acknowledge. However, they stress that in each year after payment of debt, other corporate requirements and dividends on the Class A stock, substantial earnings were available to pay a much higher dividend than \$5 on the Class B stock. This by itself, however, would not carry the day for the plaintiffs. The directors who were deposed swore that the declaration of dividends in each year was based upon prudent business judgment, which took into account MoPac's current and long range needs. This basically is the defense to plaintiffs' charges. The defendants emphasize that since the merger route was foreclosed to MoPac, it was essential, in order to protect its competitive position, to purchase large blocs of securities in other railroads, which required large cash expenditures; also that cash was used or required for equipment, up to date maintenance, capital improvement programs, current and projected, as well as other purposes vital to MoPac's competitive standing. To underscore their defense of prudent business judgment, the defendants refer to MoPac's Articles

16. Cf. Saylor v. Lindsley, 456 F.2d 896, 901 (2d Cir. 1972); Cherner v. Transitron Electronic Corp., 221 F.Supp. 48, 51 (D.Mass.1963).

17. Zerkle v. Cleveland-Cliffs Iron Co., 52 F.R.D. 151, 159 (S.D.N.Y.1971); cf. Ferguson v. Birrell, 190 F.Supp. 506, 509 n. 10 (S.D.N.Y.1960), aff'd sub nom. Ferguson v. Tat. h. 288 F.2d 665 (2d Cir. 1961).

18. Cf. Guttman v. Illinois Cent. R.R., 91 F.Supp. 285 (E.D.N.Y.1950), aff'd, 189 F.2d 927 (2d Cir.), cert. denied, 342 U.S. 867, 72 S.Ct. 107, 96 L.Ed. 652 (1951); W. Q. O'Neill Co. v. O'Neill, 108 Ind. App. 116, 25 N.E.2d 656 (1940); Dodge

v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668 (1919); Walsh v. Walsh, 285 Mo. 181, 226 S.W. 236, 245 (1920); Patton v. Nicholas, 154 Tex. 385, 27 S.W.2d 848 (1955).

19. See Wabash Ry. v. Barclay, 280 U.S. 197, 203, 50 S.Ct. 106, 74 L.Ed. 368 (1930); see also New York, L. E. & W. R.R. v. Nickals, 119 U.S. 296, 307, 7 S.Ct. 209, 30 L.Ed. 363 (1886).

20. See Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668, 681-682 (1919); 11 W. Fletcher, Private Corporations § 5325 (rev. ed. 1971) and cases cited therein.

21. Staats v. Biograph Co., 236 F. 454, 457 (2d Cir. 1916).

wants of litigation."¹³ With that guidance, we turn to the task at hand.

[3] At the outset is the simple fact that the interests of each class of stockholders is tied up with the welfare of MoPac. Its operating efficiency and its competitive strength spell out economic success, which alone gives value to its stock, whatever the class. MoPac is in competition with a number of railroads, some of which, following trends in the industry and consistent with the congressional policy of encouraging consolidation of the nation's railroads into a limited number of systems,¹⁴ have merged with other lines to effect economies and to improve efficiency. Other competitors are in the process of effecting consolidations. These merged, and the likely to be merged, competitors pose a potential threat to MoPac by depriving it of all but its short haul market and in other respects—as MoPac's chief executive officer states, "[it] could prove competitively ruinous." There can be little doubt that to maintain its competitive strength it is imperative that MoPac link itself with another system. Yet its efforts in this direction have been thwarted because of the disparate interests of the two classes of shareholders. **Specific instances have been cited where other railroads have shied away from proposed consolidations because of the stockholders situation.**

13. *Protective Comm. v. Anderson*, 390 U.S. 414, 424-425, 58 S.Ct. 1157, 1163, 29 L.Ed.2d 1 (1968). *Accord*, *Newman v. Stein*, 464 F.2d 689, 692 (2d Cir.), cert. denied, *Benson v. Newman*, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972); *Saylor v. Lindsley*, 456 F.2d 896, 904 (2d Cir. 1972); *West Virginia v. Chas. Pfizer & Co.*, 449 F.2d 1079, 1085 (2d Cir.), cert. denied, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971). With regard to weighing the benefits of the compromise against the likely rewards of litigation, *see* *Purcell v. Keane*, 54 F.R.D. 455, 460 (E.D.Pa. 1972); *Glickin v. Bradford*, 35 F.R.D. 144, 152 (S.D.N.Y. 1964). *But cf.*

MoPac, to protect its position against merged and other competing lines, has purchased through the years controlling securities of other railroads, a matter discussed hereafter. However, the stock acquisition method does not yield all the advantages of a merger. The elimination of the present capital structure with its built-in conflict between the two classes, which has foreclosed merger to date, will permit MoPac's officials to pursue merger prospects; it will also permit its officials to function full time in its interests and its stockholders—thousands upon thousands of hours have been devoted to litigation instead of to railroad operation.¹⁵

Another benefit favoring the settlement is that it provides the effective means for payment of greater dividends and thus meets in part the demands of plaintiffs. The Board of Directors anticipates that the annual dividend rate will be \$5 per share on each class of stock to be issued under the Plan. With the Class B stockholders receiving sixteen shares new stock for their present one share (in addition to the \$850 cash), the dividend return will be \$80 per annum as against the current \$5 per share. Mississippi, committed to the purchase of **at least 400,000 shares of the new common stock (apart from such additional common stock it may own by reason of conversion of its preferred after one**

Norman v. McKee, 431 F.2d 769, 774 (9th Cir. 1970), cert. denied *I.S.I. Corp. v. Myers*, 401 U.S. 912, 91 S.Ct. 879, 27 L.Ed.2d 811 (1971).

14. *See Penn Central Merger and N. & W. Inclusion Cases*, 389 U.S. 486, 492, 88 S.Ct. 602, 19 L.Ed.2d 723 (1968); *see also* N.Y. Times, Feb. 16, 1973, at 1, col. 7.

15. *Cf. Denicke v. Anglo Cal. Nat'l Bank*, 141 F.2d 285, 288 (9th Cir.), cert. denied, 323 U.S. 739, 65 S.Ct. 44, 89 L.Ed. 592 (1944); *Derdarian v. Futterman Corp.*, 38 F.R.D. 178, 181 (S.D.N.Y. 1965).

year) would have an economic interest in the declaration of dividends on the new common stock.

Other advantages are evident. The conversion of the Class B stock into sixteen shares makes them more marketable and to this extent meets the derivative claim that the defendants failed to split the Class B stock, thereby broadening public interest in it. Additionally, at the present time the Class B stock elects no directors. Under cumulative voting the new common stock would have the means of representation on the Board of Directors.

[4] We next consider a, if not the, most important factor—the probability of plaintiffs' success upon a trial, and, if successful, "the likely rewards of [the] litigation." The extensive pretrial discovery conducted by the parties has exposed their respective strengths and weaknesses.¹⁶ While each litigant professes confidence in his cause, it is with recognition of the force of a countervailing position and also, as all are aware, that "[s]tockholder litigation is notably difficult and unpredictable."¹⁷

[5-8] Plaintiffs have the burden of proof as to their claims. To prevail, they must establish under the allegations of their complaints that MoPac's Board of Directors, in subservience to the wishes of Mississippi, abused their discretionary powers and arbitrarily and unreasonably withheld dividends in each

year, although MoPac's condition warranted such additional dividends.¹⁸ Since the determination of whether a dividend should be declared rests in the first instance with the Board of Directors,¹⁹ courts may intervene only when there has been bad faith, neglect or abuse of discretion.²⁰ This is indeed a heavy burden,²¹ which plaintiffs' experienced counsel frankly acknowledge. However, they stress that in each year after payment of debt, other corporate requirements and dividends on the Class A stock, substantial earnings were available to pay a much higher dividend than \$5 on the Class B stock. This by itself, however, would not carry the day for the plaintiffs. The directors who were deposed swore that the declaration of dividends in each year was based upon prudent business judgment, which took into account MoPac's current and long range needs. This basically is the defense to plaintiffs' charges. The defendants emphasize that since the merger route was foreclosed to MoPac, it was essential, in order to protect its competitive position, to purchase large blocs of securities in other railroads, which required large cash expenditures; also that cash was used or required for equipment, up to date maintenance, capital improvement programs, current and projected, as well as other purposes vital to MoPac's competitive standing. To underscore their defense of prudent business judgment, the defendants refer to MoPac's Articles

16. Cf. Saylor v. Linsley, 456 F.2d 896, 901 (2d Cir. 1973); Cherner v. Transitron Electronic Corp., 221 F.Supp. 48, 51 (D.Mass.1963).

17. Zerkle v. Cleveland-Cliffs Iron Co., 52 F.R.D. 151, 159 (S.D.N.Y.1971); cf. Ferguson v. Birrell, 190 F.Supp. 506, 509 n. 10 (S.D.N.Y.1960), aff'd sub nom. Ferguson v. Tabah, 288 F.2d 665 (2d Cir. 1961).

18. Cf. Guttman v. Illinois Cent. R.R., 91 F.Supp. 285 (E.D.N.Y.1950), aff'd, 189 F.2d 927 (2d Cir.), cert. denied, 342 U.S. 867, 72 S.Ct. 197, 96 L.Ed. 652 (1951); W. Q. O'Neill Co. v. O'Neill, 108 Ind. App. 116, 25 N.E.2d 656 (1940); Dodge

v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668 (1919); Walsh v. Walsh, 285 Mo. 181, 226 S.W. 236, 245 (1920); Patton v. Nicholas, 154 Tex. 385, 279 S.W.2d 848 (1955).

19. See Wabash Ry. v. Barclay, 280 U.S. 197, 203, 50 S.Ct. 106, 74 L.Ed. 368 (1930); see also New York, L. E. & W. R.R. v. Nickels, 119 U.S. 293, 307, 7 S.Ct. 209, 30 L.Ed. 363 (1886).

20. See Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668, 681-682 (1919); 11 W. Fletcher, *Private Corporations* § 5325 (rev. ed. 1971) and cases cited therein.

21. Staats v. Biograph Co., 236 F. 451, 457 (2d Cir. 1916).

of Association which give the Board of Directors broad powers to set aside reserves and make such other provisions as the Board "shall deem to be necessary or advisable for working capital, for expansion of the business of the Company . . . and for any other purpose of the Company."²² The Court has reviewed the pretrial material on the issue of prudent business judgment and the defendants' position thereon cannot be said to be lacking in substance. In any event, it points up the issue as a substantial one to be resolved upon a trial. Plaintiffs, upon the whole case, would have the burden of establishing that the directors, notwithstanding the explanation of the factors which influenced their judgment, were in fact acting in bad faith or in an arbitrary manner. Directors are permitted a very liberal discretion in determining matters of business policy.²³ And if that discretion has been exercised in good faith, that it may have been injudicious or even if the Court believed a different policy were desirable, would not, by itself, be sufficient to sustain plaintiffs' burden.²⁴

Moreover, even if plaintiffs should prevail upon the merits on the issue of additional dividends, it would not necessarily mean a total recovery. The Court would face the question of determining what would have constituted adequate dividends *in each year during the period from 1964 through 1971*—a decision requiring consideration of numerous vari-

ables, making the likelihood of substantial recovery questionable. The problem, as acknowledged by all parties, is difficult of solution. As counsel for Alliancy recognizes:

"Thus, if a finding of wrongdoing were made, there would remain the problem of proving the amount of additional dividends which should have been paid. The effect of this difficult problem of proof on the outcome of the lawsuit might well depend upon which party was deemed to have the burden of proof. If plaintiffs were required to prove that the dividends paid by MoPac were inadequate, that burden could have remained unmet and recovery could have been denied. On the other hand, if defendants were required to prove the adequacy of the dividends paid, they might well have failed to meet that burden, and as a result plaintiffs might have won a substantial recovery."²⁵

Plaintiffs' problems are further compounded since it is doubtful that the Court would retain jurisdiction, as plaintiffs request, in order to monitor the MoPac Board's future dividend policy which, initially, is the Board's responsibility. Such future judicial supervision of MoPac's dividend policy would require the Court to make complex business decisions from year to year as to amounts to be retained out of earnings in order to determine the net income

22. MoPac's Articles of Association, Article VII D(1).

23. *Cf. Fielding v. Allen*, 99 F.Supp. 137, 142 (S.D.N.Y.1951); *Dodge v. Ford Motor Co.*, 294 Mich. 459, 170 N.W. 668, 681-682 (1919); *Park v. Grant Locomotive Works*, 40 N.J.Ea. 114, 117-118, 3 A. 162, 165 (Ch.1885), aff'd, 45 N.J. Eq. 244, 19 A. 621 (Ct.Err. & App.1885); *Leslie v. Lorillard*, 110 N.Y. 519, 532, 18 N.E. 363, 365 (1888); *Casey v. Woodruff*, 49 N.Y.S.2d 625, 643 (Sup. Ct. 1944).

24. *Cf. Taussig v. Wellington Fund, Inc.*, 313 F.2d 472, 479 (3d Cir.), cert. denied,

374 U.S. 806, 83 S.Ct. 1693, 10 L.Ed.2d 1031 (1963); *Everett v. Phillips*, 288 N.Y. 227, 43 N.E.2d 18 (1942); *Bourne v. Bourne*, 240 N.Y. 172, 177-178, 148 N.E. 180, 181 (1925); *Gallagher v. New York Dock Co.*, 19 N.Y.S.2d 789, 800-801 (Sup.Ct.1940), aff'd, 263 A.D. 878, 32 N.Y.S.2d 348 (2d Dep't 1942); *see also Briggs v. Spaulding*, 141 U.S. 132, 11 S.Ct. 924, 35 L.Ed. 662 (1891); *Masterson v. Pergament*, 203 F.2d 315, 330 (6th Cir.), cert. denied, 346 U.S. 832, 74 S.Ct. 33, 98 L.Ed. 355 (1953).

25. Affidavit of M. Lauck Walton, Jan. 23, 1973, at 23.

available for the declaration of dividends. In end result, were the Court to retain jurisdiction, it would be required to function as MoPac's sole director in place of its duly elected Board of Directors.

Some objectors cite *Dodge v. Ford Motor Co.*,²⁶ as giving strength to plaintiffs' position. However, the court adopted the general principle against judicial intervention in corporate affairs. The *Dodge* court did conclude that plaintiffs had produced sufficient evidence to prove that the directors were running the corporation for the benefit of persons other than the stockholders and therefore justified in requiring the payment of reasonable dividends. The facts of the *Dodge* case are by no means similar to those in the instant case. Similarly, *Mayflower Hotel Shareholders Protective Committee v. Mayflower Hotel Corp.*,²⁷ merely demonstrates that the plaintiffs have alleged a valid cause of action, not necessarily a successful one.

As to the conspiracy charge—that Mississippi conspired with others by various acts and means to "freeze out" the Class B stockholders or to depress the market price of the stock—plaintiffs face perhaps an even heavier burden, since it is conceded that no tangible or direct evidence has thus far been unearthed to sustain the charge; perforce, plaintiffs would have to rely upon circumstantial evidence and urge that the fact finder draw inferences therefrom of wrongful motive and conspiratorial conduct.

26. 204 Mich. 459, 170 N.W. 668 (1919).

27. 84 U.S.App.D.C. 275, 173 F.2d 416 (1949).

28. *See, e.g., Affiliated Ute Citizens v. United States*, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 92 S.Ct. 165, 30 L.Ed. 2d 128 (1971).

29. *See Cochran v. Channing Corp.*, 211 F.Supp. 239 (S.D.N.Y. 1962).

[9] The third cause of action, based upon defendants' acts and conduct in connection with the alleged conspiracy to "freeze out" the B shareholders and allegedly resulting in violations of section 10(b) of the Securities Exchange Act, the rule thereunder and defendants' common law fiduciary duties, also presents problems of proof for plaintiffs. Plaintiffs here charge that during the existence of the alleged conspiracy Mississippi and the defendant T. C. Davis bought and sold shares of B stock; that the objective of the scheme was to depress the market of the B stock, thereby forcing plaintiffs to sell at prices much below their true value. Even considering the current liberalization of Rule 10b-5,²⁸ and that plaintiffs' position may have some support,²⁹ plaintiffs must carry the burden of proving that defendants' actions were fraudulent³⁰ or unjustified,³¹ and that such conduct in some way caused plaintiffs' injury.³² As to the latter, it is interesting to note that plaintiffs do not seek separate relief on their 10b-5 claim; instead, they urge that the damages be measured by the amount of reasonable dividends allegedly withheld by the defendants during 1964-1971. By invoking this measure of damages, plaintiffs also face the same problems already discussed as to the extent of recovery under the dividend cause of action.

As to the derivative causes of action, one claim seeks to hold Mississippi and the individual defendants accountable for the expenses incurred by MoPac in con-

30. *See List v. Fashion Park, Inc.*, 340 F.2d 457 (2d Cir.), cert. denied, 382 U.S. 811, 56 S.Ct. 23, 15 L.Ed.2d 60 (1965).

31. As to justification, the same problems will be encountered here as in the dividend cause of action.

32. *Cf. Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12-13, 92 S.Ct. 165, 30 L.Ed.2d 128 (1971); *Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540, 546 (2d Cir. 1967).

nnection with the plan to consolidate MoPac with T & P, which was abandoned following the Supreme Court decision. Even were the plaintiffs to establish that the proposed consolidation was not in MoPac's interest but calculated to favor Mississippi,³³ the likelihood of recovery on this claim is diminished by the holding by the Eighth Circuit Court of Appeals that MoPac was not responsible to the plaintiffs for their legal fees and expenses in the voting rights litigation.³⁴ Additionally, plaintiffs would be hard put to prove that the proposed consolidation of MoPac with T & P was not a justifiable business decision by the MoPac Board. As already noted, the Supreme Court expressly disavowed that it passed upon the merits of the proposal.

To state all the foregoing, of course, is no forecast of result upon a trial. It is simply to recognize, as the principals themselves do, that the action presents many obstacles, particularly for plaintiffs, who have the burden of proof. With the defendants vehemently denying wrongful conduct, were the case to be tried, all the issues would be vigorously contested, with the outcome obviously uncertain. The probability of ultimate success at best can only be cautious prophecy.

Having examined the benefits of the settlement and the prospect of success upon a trial, other factors merit consideration. As all parties stress, were the plaintiffs to prevail upon the trial, or whatever its outcome, there would

33. As to the merits, the Court of Appeals for the Eighth Circuit recognized the issues in the voting rights litigation were complex and that no court had passed upon the fairness of the plan itself. Missouri Pac. R.R. v. Slayton, 407 F.2d 1078, 1082, 1083 (8th Cir.), cert. denied, Alleghany Corp. v. Missouri Pac. R.R. Co., 395 U.S. 937, 89 S.Ct. 1998, 23 L.Ed.2d 451 (1969).

34. Missouri Pac. R.R. v. Slayton, 407 F.2d 1078 (8th Cir.), cert. denied, Alleghany Corp. v. Missouri Pac. R.R., 395 U.S. 937, 89 S.Ct. 1998, 23 L.Ed.2d 451 (1969).

still remain the root cause of the conflict between the two classes of stockholders—the separation between equity ownership (principally in the B stock) and management control (in the A stock). And as long as it exists there will be continued hostility between the two and the potential of renewed litigation. Its elimination will be an advantage to all concerned. The settlement also provides for the elimination of Alleghany's ownership of equity stock, which Mississippi is to acquire. With Alleghany no longer an opposing force, it should mean stability in management and operation of MoPac.

[10,11] Another factor favoring the settlement, but by no means determinative,³⁵ is the unanimous judgment of all the parties, their counsel and their investment analysts and advisers that its terms are eminently fair. To be sure, the final judgment as to the fairness of the proposal is the responsibility of this Court, but their joint recommendation is entitled to substantial weight,³⁶ particularly so in the instant case. A unique situation exists here not present in the usual stockholders' suit recommended to the courts for settlement, where oftentimes the plaintiffs representing the class own a relatively small economic interest in the corporation. Alleghany's self-interest as the owner of 53% of the Class B stock gives some assurance that it negotiated to obtain the best possible terms for that group viz-a-viz the Class A stockholders.³⁷ The other two plain-

35. Cf. Cohen v. Young, 127 F.2d 721, 725 (6th Cir. 1942).

36. See Cannon v. Texas Gulf Sulphur Co., 55 F.R.D. 306, 316 (S.D.N.Y.1971); Percodani v. Riker-Maxson Corp., 50 F.R.D. 473, 477 (S.D.N.Y.1970); Schleiff v. Chesapeake & O. Ry., 43 F.R.D. 175, 179 (S.D.N.Y.1967); Glicken v. Bradford, 35 F.R.D. 144, 152 (S.D.N.Y.1964); Fielding v. Allen, 99 F.Supp. 137, 144 (S.D.N.Y.1951).

37. Cf. Cherner v. Transitron Electronic Corp., 221 F.Supp. 48, 51 (D.Mass.1963).

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tiffs, minority Class B stockholders, each also owns a substantial number of shares reflecting a heavy investment in the stock. Their counsel have acted independently of Alleghany's counsel in representing the interests of the Class B minority shareholders. These three plaintiffs and their counsel over a long period have been alert to enforce the rights of Class B stockholders. The lawyers for the plaintiffs in this action also represented them in the Missouri voting rights case and, over Mississippi's strong opposition, successfully upheld the right of the Class B stockholders as a separate group to vote upon consolidations. They are particularly knowledgeable with respect to the basic facts of MoPac and the hard core issues of this litigation; they are especially experienced in this field of law. Additionally, the parties, during the course of the litigation and in the negotiations, had the benefit of the advice of experienced independent railroad investment advisers and analysts. The record leaves no room to doubt that the negotiations were conducted in good faith and at arms length, with the Class B stockholders represented by sophisticated, if not hardened, negotiators who deem the settlement the best result obtainable without a trial of the issues on the merits.³⁸

Finally, the fairness of the settlement is emphasized by the provision that, despite Mississippi's and Alleghany's ef-

38. Cf. Mutual Shares Corp. v. Genesco, Inc., [1967-1969 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,315 (S.D.N.Y. 1968); Chernet v. Transitron Electronic Corp., 221 F.Supp. 48, 51 (D.Mass. 1963).

The fact that the form of the settlement decided upon is somewhat unusual and that it includes some benefits which cannot be evaluated in financial terms does not militate against its acceptance; the parties are not limited great freedom in shaping the form of settlement consideration. Cf. Dardarian v. Futterman Corp., 38 F.R.D. 178 (S.D.N.Y. 1965); Manacher v. Reynolds, 39 Del.Ch. 401, 165 A.2d 741, 747 (Ch. 1960); Levy v. Babb, 39 Misc.2d 648, 241 N.Y.S.2d 642 (Sup.Ct. 1963).

fective voting control by reason of their respective majority ownership of the Class A and B stock, sufficient under MoPac's charter to put through a recapitalization, the Plan cannot be effected without the approval of a majority of the other stockholders of each class³⁹—in effect, acceptance of the settlement rests with them regardless of the desires of Mississippi and Alleghany.

The factors militating in favor of the settlement are indeed substantial, but a number of Class B stockholders challenge it as unfair and inadequate.

THE OBJECTIONS

[12, 13] At the hearing on this motion, Class B stockholders or their attorneys appeared and others communicated with the Court by letter to voice their objections to approval of the Plan. There are eighteen objectors who own a total of approximately 1,167 shares.⁴⁰ They concentrate their attack on the alleged inadequacy of the exchange for their holdings; its tax consequences; they also contend the settlement is unfair as between them and Alleghany as the majority Class B stockholder. Almost all the objectors agree that the litigation should be settled, but on better terms than those proposed; failing that, they urge rejection of the settlement.

The primary objection is that the package value of \$850-16 shares of new

39. Compare Winkelman v. General Motors Corp., 48 F.Supp. 490, 495 (S.D.N.Y. 1942).

40. The 39,371 outstanding Class B shares are held by some 950 individuals or corporations. That a comparatively small number of holders of shares reflecting a small percentage of the total outstanding oppose, as against a great majority who favor, the settlement does not relieve the Court of its function in passing upon the fairness of the proposal. See Protective Comm. v. Anderson, 390 U.S. 414, 435, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968); cf. American United Mutual Life Ins. Co. v. City of Avon Park, 311 U.S. 138, 148, 61 S.Ct. 157, 85 L.Ed. 91 (1940).

common stock for each share of present Class B stock yields substantially less than the value of the shares to be surrendered. The substance of this challenge rests principally upon the existing rights of the Class B stock as against those of the Class A stock. A major premise in the objectors' attack is their view that realistically the Class A stock is a noncumulative preference stock limited to a \$5 per year dividend and to \$100 per share upon liquidation; that realistically the Class B stock is the common stock entitled to unlimited dividends as may be declared and to all MoPac's equity above the \$100 per share attributable to the Class A stock. These differences are the hard core of the objectors' valuation and other contentions. However, merely to state the differences in rights between the two classes of stock is too simplistic an approach; countervailing factors cannot be ignored. A factor of force is that the Class A stock, whether termed a "preference" or "hybrid" stock, or otherwise, has one vote per share, just as each share of Class B stock, with the result that the Class A stock not only controls the management of MoPac, but also can and, as plaintiffs charge, does exercise this control to withhold dividends from the Class B stock, whereas the Class B stock, a small minority of all outstanding shares, has the veto power over mergers, consolidations and other important corporate actions, and yet it is without sufficient voting strength to elect even one director. Another countervailing factor which cannot be disregarded is that the Class A stock, while noncumulative, is entitled to receive dividends out of retained earnings in each year even if current earnings for a particular year may be insufficient to cover dividend requirements on the A stock. Consideration of the objectors' contentions with respect to the value of their stock cannot ignore these elements. Thus we turn to the specific objections.

Almost all the parties are in accord that the new common shares can be valued at about \$100 per share, so that the 8850-16 share package conversion rate equals approximately \$2,450 for each present Class B share. But objectors and proponents differ on the present value of the B stock, as well as the A stock. It would serve no useful purpose to analyze in detail their computations whereby they evaluate the present worth of each class. Their differing estimates derive from the methods used to value the shares.

Most objectors evaluate the shares by their book value. Several apply the capitalization of net earnings method; in this instance, they allocate to the Class B stock all of MoPac's annual net earnings above the annual Class A dividend requirements. Their position is that the earnings of the Class A stock cannot exceed its maximum dividend, that is, \$9,319,000, or \$5 per share, and consequently the balance of each year's earnings should be allocated to the Class B stock. By their respective methods the objectors calculate that the present worth of each share of Class B stock ranges from somewhat over \$4,000 to the unrealistic, if not astronomical, figure of \$25,000. Those objectors who capitalize net earnings as allocated by them to the Class B stock estimate, at a price-earnings ratio of 10-1, its value at \$4,450 per share. At a 9-1 ratio, it would be \$4,005 per share (1972 earnings).

The proponents, in evaluating the present worth of the two classes of stock, also apply the capitalization of recent earnings method (1971-1972). However, their method of allocation of earnings differs from that of the objectors. Instead of deducting the Class A maximum annual dividend requirement from net earnings, the proponents take into account the market value of the Class A stock, which shortly before the announcement of the settlement, was selling be-

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tween \$70-75 per share.⁴¹ They capitalize MoPac's earnings for the two years on a 9-1 basis, resulting in its capitalized value of \$225,000,000 to \$243,000,000. The market value of the Class A stock is deemed its true value, and accordingly its aggregate market value is deducted from MoPac's capitalized value and the difference allocated to the Class B stock, with the end result that the Class B stock is valued at an average of \$2.365 per share; a 10-1 capitalization rate would bring the average value somewhat higher.

[14, 15] Before considering the respective contentions, it is desirable to emphasize the Court's function on this application, already referred to; particularly so, since a number of objectors advance their arguments of stock valuation as if this were a proceeding under section 77 of the Bankruptcy Act,⁴² where the phrase "fair and equitable," a term of art,⁴³ requires recognition of priority rights of senior securities owners on the basis of full compensatory value. The Court here is not called upon to make a definitive assessment of the value of each class of stock, old or new—that is not even a requirement were the proceeding one under section 77,⁴⁴ where with its standard of "fair and equitable," it is recognized that "the pretenses of exactitude" in determining a dollar value for a railroad property is somewhat illusory.⁴⁵ The Court here is

concerned with a proposed settlement of a lawsuit and whether its terms, taking into account the probabilities of success upon a trial, and all pertinent factors, are "fair, reasonable, and adequate . . . terms [that] are general and cannot be measured scientifically."⁴⁶ In passing upon a proposed settlement of a stockholder's litigation, the standard "fair, reasonable and adequate" is not to be equated with "fair and equitable," applicable to a proposed railroad reorganization under the Bankruptcy Act. In the compromise of a stockholder's lawsuit there necessarily come into play "practical adjustments,"⁴⁷ elements of give and take by the respective interested parties, depending upon their strengths and weaknesses in the litigation;⁴⁸ and, of course, the uncertainty of its outcome, as well as the rewards, if successful, are important considerations in the process of compromise and concession.

[16, 17] First, as to book value as a method of valuation. The authorities are in agreement that book value is of little significance in appraising the value of stock; that what is of prime significance is a corporation's earning potential based on past experience.⁴⁹ The contention made by the objectors as to the change in equity between the two classes of stock is related to the book value concept. There appears to be no dispute that should the new preferred

41. Consideration was given to the effect of the public announcement of the proposed settlement.

42. 11 U.S.C. § 205.

43. *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 115, 60 S.Ct. 1, 84 L.Ed. 110 (1939).

44. See *Group of Institutional Investors v. Chicago, M. St. P. & Pac. R. R.*, 318 U.S. 523, 564-565, 63 S.Ct. 727, 87 L.Ed. 959 (1943).

45. *Id.* at 565, 63 S.Ct. 727.

46. *West Virginia v. Chas. Pfizer & Co.*, 314 F.Supp. 710, 740 (S.D.N.Y.1970), aff'd 446 F.2d 1079 (2d Cir.), cert. denied, 404

U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971).

47. Cf. *Group of Institutional Investors v. Chicago, M. St. P. & Pac. R. R.*, 318 U.S. 523, 565, 63 S.Ct. 727, 87 L.Ed. 959 (1943).

48. See *Masterson v. Pergament*, 203 F.2d 315, 330 (6th Cir.), cert. denied, 346 U.S. 832, 74 S.Ct. 33, 98 L.Ed. 355 (1953); *Percodani v. Riker-Maxson Corp.*, 50 F.R.D. 473, 477 (S.D.N.Y.1970).

49. Cf. *Ecker v. Western Pac. R. R.*, 318 U.S. 448, 483, 63 S.Ct. 692, 87 L.Ed. 892 (1943); *Consolidated Rock Prods. Co. v. Du Bois*, 312 U.S. 510, 525-526, 61 S.Ct. 675, 85 L.Ed. 982 (1941).

(1,864,052) shares be converted into new common, the equity position of the B stockholders would be reduced from 61½% to 25½%. The objectors and proponents differ as to the importance of the shift in equity. The terms equity and book value are essentially synonymous.⁵⁰ They would have relevance if there were the prospect of MoPac's liquidation⁵¹ or a takeover of the railroads by the government. Neither liquidation nor the nationalization of the railroads of the country is an imminent likelihood. Judge Learned Hand's sage observation of the fallacy of measuring the value of shares by their book value is as sound today as when he stated it almost fifty years ago:

"The suggestion that the book value of the shares is any measure of their actual value is clearly fallacious. It presupposes, first, that book values can be realized on liquidation, which is practically never the case; and, second, that liquidation values are a measure of present values. Everyone knows that the value of shares in a commercial or manufacturing company depends chiefly on what they will earn, on which balance sheets throw little light. . . ."⁵²

Next, as to the capitalization of earnings method, it has been already noted that the difference in valuation between objectors and proponents of the Class A and Class B stock results from different methods of allocating earnings to the

50. See Accountants' Handbook § 3, at 11 (R. Waxon ed. 1965); Prentice-Hall Encyclopedic Dictionary of Business Finance 78-79, 237 (1969).

51. MoPac's financial expert is of the view that were the corporation to liquidate it would probably be in such poor financial condition that no equity would be available for distribution to stockholders. Affidavit of F. L. Lee Jones, Jan. 23, 1973, at 6.

52. *Borg v. International Silver Co.*, 11 F.2d 147, 152 (2d Cir. 1925).

53. Affidavit of F. L. Lee Jones, Jan. 23, 1973.

two. Since the matter is one of judgment, there is room for disagreement. The Court has examined the submissions of the parties on this subject and is persuaded that the method of valuation, which takes into account the market value of the Class A shares and the underlying factors in its support offered by an expert retained to give an independent evaluation, is of substance and merits consideration.⁵³ The expert, after taking into account the market value of the Class A stock, valued the Class B stock at \$2,365 per share.⁵⁴

[18] The Class A stock is listed on the New York Stock Exchange, is traded in a broad market, and almost 700,000 shares are held by the public. With an active market for the Class A stock, it cannot be said that to ascribe the market price as its fair value is unreasonable. The market evaluation of a stock may reflect a more realistic appraisal of its value than a conceptual evaluation. Theory must yield to the reality of the market place, "the true appraiser."⁵⁵ Indeed, to quote Judge Learned Hand again: "When all is said, value is nothing more than what people will pay for"⁵⁶

[19] The Class B stock is traded in on the over-the-counter market; the market is thin; and the traders are few. The market for the Class B stock has never approached the values urged by the objectors. The range has been be-

54. Alleghany's chief financial officer also took into account the market value of the Class A stock in appraising the value of the Class B stock and reached approximately the same valuation. Affidavit of John J. Burns, Jan. 22, 1973.

55. *New York, N. H. & H. R. R.*, 1st Mtg. 4% B. C. v. United States, 305 F.Supp. 1049, 1069 (S.D.N.Y.1969) (Weinfeld, J., dissenting), vacated sub nom. *New Haven Inclusion Cases*, 399 U.S. 392, 90 S.Ct. 2054, 26 L.Ed.2d 691 (1970).

56. *Borg v. International Silver Co.*, 11 F.2d 147, 152 (2d Cir. 1925).

tween \$1,100 and \$2,500 per share.⁵⁷ The conclusion is warranted that the public market, in pragmatic terms, has taken into account MoPac's unusual capitalized structure, whereby a so-called preference stock has voting rights that control not only MoPac's management, but also its dividend policy with the power to withhold dividends from the Class B stock, and accordingly appraised the value of the two classes of stock based upon their respective power, rights and restrictions.

Another factor suggests that the proponents' experts' valuations are closer to the mark than the objectors' valuations. Alleghany, as the majority owner of the Class B stock, has, through the years, been the principal antagonist to Mississippi, the majority owner of the Class A stock. Widely divergent views as to the B stock's value have, up to the present, foreclosed any compromise. Alleghany's acceptance of the settlement as a disposition of their longstanding controversy during which it has spent millions to protect its investment may be said to reflect a realistic recognition of the true value of the Class B shares. If the objectors' evaluation of \$4,000 or more per share is sound, then Alleghany, owning in excess of 21,000 shares, has, after many years of litigation, suddenly given up the ghost and yielded more than \$40,000,000⁵⁸—hardly a likelihood in view of the history of events and the sophistication of its financial executives and advisers.

Also, it is not without significance that objector Garfield's securities expert, who on the capitalization of earnings

57. While the Class B stockholders contend that the market price of their stock has been depressed by the acts of the defendants, we deal with the fact situation as it exists. Whether the market price of the Class B shares is the consequence of defendants' alleged conduct is one of the issues to be decided were the case to go to trial. Similarly, objections directed at the failure of MoPac to report the earnings allocable to the B shares, as to which defendants offer an explanation, also go to

method fixes a value of "over \$4,000" a share for the Class B stock, nonetheless concludes "that if the impasse between the Class A and the Class B is to be settled, there must be a compromise at a lower figure to reflect the lack of voting control of the Class B"⁵⁹—another way of saying that any evaluation of the stock must make allowance for its encumbered status. Obviously that compromise figure cannot be a matter of mathematical precision; it need not be; it is a matter of judgment based upon a consideration of factors pro and con, some of which have been adverted to above. This Court is satisfied that the package of 8850-16 shares common stock in exchange for each Class B share cannot be said to be inadequate, especially so when considered as a compromise.

However, the objectors argue that even so, the plan is unfair in that the compromise should be only in terms of new common stock and not include any cash payment. They contend that the \$850 cash payment per share will be taxed as ordinary income, and with their individual income situations they will be subjected to high surtax rates, whereas Alleghany, by reason of its corporate structure, faces, with respect to the cash payment, a 7.2% rate. Objector Garfield contends that under the cash-stock exchange, Alleghany will benefit by over \$4,000,000 in comparison with an all stock plan. Several alternative plans, including a tax free exchange (24½ shares of new common instead of the 8850-16 shares for each Class B share) are proposed by objectors as being more equitable. Many of these suggestions

the merits of plaintiffs' claim, not to the fairness or adequacy of the settlement.

58. Even assuming objector Garfield's contention as to tax consequences is correct (see p. 371 *infra*), an alleged tax benefit of \$4,000,000 to Alleghany under the part cash payment plan would hardly justify giving up \$40,000,000.

59. Affidavit of David M. Day, Jan. 30, 1973, ¶ 5.

were considered during the course of the extended negotiations. One such plan envisaged giving the minority Class B stockholders an option to receive all stock (24 $\frac{1}{2}$ shares) in exchange for each Class B share instead of the \$850-16 share package. However, based upon the opinion of independent tax counsel retained especially by the Class B representatives, other than Alleghany, this alternative was rejected since its tax consequences were potentially more unfavorable than those under the cash and stock exchange. Independent tax counsel was of the view that such an option would have exposed a substantial portion of the shares to ordinary income tax treatment.

Another approach would have eliminated the cash payment and given only stock to all Class B stockholders, including Alleghany. This proposal met with rejection because it would lower Mississippi's degree of control below its present level and further could fail to eliminate the present divided control within MoPac since Mississippi would control the preferred but not necessarily the common. To assure elimination of the divided control, as well as the friction and litigation it has engendered, Mississippi deems it essential that it have a substantial majority interest in both classes of stock. This accounts for its cash tender offer to purchase not less than 400,000 shares of new common at \$40,000,000 and Alleghany's commitment to tender all its 339,888 shares of new common stock upon their receipt. Additionally, the proposal would place Alleghany in a minority position without real control over its investment and deprive it of the veto power it now has as the majority owner of the present Class B stock. Neither Mississippi nor Alleghany was amenable to this situation. Objector Garfield's suggestion that if Mississippi desires to retain its present degree of stock control that it purchase the additional shares of the new common stock to be issued to Alleghany under

an all stock exchange would require Mississippi to expend, in addition to its present commitment of \$40 million cash, another \$20 million, an added obligation it is not prepared to assume.

[20] Whether or not the reasons for rejection of the alternative proposals were justified is not the question before this Court, which is called upon to decide whether the settlement reached by the litigants and submitted for approval is fair and reasonable. The discharge of this function does not require the Court to reopen negotiations in an effort to secure more advantageous terms, which plaintiffs, in sophisticated and arms length bargaining, were unable to secure for themselves and the class they represent. Taxes are taxes; the rates are fixed by Congress; they cannot be adjusted in particular cases to accommodate an individual taxpayer's obligation as to income derived from the settlement of a lawsuit. The tax will vary in the instance of each Class B stockholder dependent upon his particular bracket, and even corporations other than Alleghany, which may own Class B stock, will face varying tax payments. The fact is that two-thirds of the conversion package is tax free. Moreover, were the case to proceed to trial and plaintiffs secured a judgment declaring the Class B stockholders entitled to dividends in given years, the entire proceeds received by each shareholder would be taxed as ordinary income. Under all the circumstances, it cannot be said that the \$850 cash payment constituting part of the conversion rate is unfair.

OTHER OBJECTIONS

[21] Several objectors question the adequacy of the notice of the proposed settlement given to stockholders, which was mailed to each registered stockholder and published in the Wall Street Journal (National Edition). The objections go to the contents of the notice. However, it sufficiently informed any interested stockholder of the nature of

the pending action, the general terms of the settlement, that complete and detailed information was available from the files of this Court, and that any stockholder could appear and be heard at the hearing; in sum, the notice fairly apprised the members of the class of the pertinent terms of the proposed compromise and the significance of the entry of a final judgment approving the settlement.⁶⁰

Two Class A stockholders of fifty shares object because the settlement is contingent upon Mississippi's ability to finance its tender offer obligation, and therefore, "if such financing is not available, the parties will have gone to considerable expense . . . to no good purpose." However, Mississippi already has secured a formal commitment of financing which has been found satisfactory by Alleghany and its counsel.⁶¹ The same objectors also express concern over the possible effects of the cash payout upon MoPac's financial structure. MoPac has represented that this presents no problem to a railroad of its size.⁶²

A MoPac debenture holder has raised a question as to possible impairment of the rights of debenture holders. Under the terms of the settlement, an opinion of MoPac's counsel is required to the effect that none of the transactions are in breach or in default of any of the provisions of any indenture or other instrument binding upon MoPac. It is represented to the Court that MoPac's counsel upon a review of all documents is prepared to render such an opinion.

60. *Air Lines Stewards Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 108 (7th Cir. 1972); see *United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co.*, 447 F.2d 647, 654 (7th Cir. 1971); see also *Winkelman v. General Motors Corp.*, 48 F.Supp. 490, 494 (S.D.N.Y. 1942).

61. Defendants' Supplemental Reply Memorandum at 5-6; Hearing Minutes at 41-42.

Objections are made to fees requested by attorneys representing the respective plaintiffs. To the extent that such allowance may be granted, the parties are to be paid equally by Mississippi and MoPac. However, the fee applications are, in the event of acceptance of the settlement, subject to approval by the Court and a separate hearing, notice of which will be given to all interested parties, at which time any objections may be presented to the Court.

CONCLUSION

This Court, after thorough consideration of all pertinent factors and of the extensive contentions of the objectors and proponents with respect thereto, and weighing the benefits to be derived from the settlement against the alternative of a continuance of this litigation, with its outcome doubtful, and, even if successful, the uncertainty of any meaningful recovery, concludes that the settlement falls within a "range of reasonableness"⁶³ that warrants its approval. In sum, it offers a permanent solution to the longstanding impasse between the two contending groups of stockholders—a result that cannot be achieved through successful litigation. Indeed, continued litigation may be said to be an exercise in futility since the hard core of the cause of differences between the two groups would remain and continue to plague them and MoPac. The settlement will afford MoPac the opportunity to pursue merger prospects so vital to its economic growth and existence and to permit its officials to give full time and attention to corporate affairs. Also

62. See Jones Affidavit at 5; Affidavit of Downing B. Jenks, Jan. 22, 1973, at 10.

63. See *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.), cert. denied, *Benson v. Newman*, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972); see also *United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co.*, 447 F.2d 647, 655-56 (7th Cir. 1971).

it means the prospect of greater annual dividends to the Class B stockholders; a broader market for their shares; and the opportunity for representation on the Board of Directors. Even were it to be found that the Class B stock approached the approximate \$4,000 value per share as estimated by a number of objectors, the settlement still would come within a range of reasonableness and warrant approval. Finally, if a majority of the minority Class B stockholders are of the view that the advantages of the settlement are insufficient to compensate for what they believe to be the value of their shares, they have the power to reject it.

The settlement is approved and judgment may be entered accordingly.



UNITED TRANSPORTATION UNION,
an unincorporated association et al.
v.
PATAPSCO & BACK RIVERS RAIL-
ROAD COMPANY, a body corporate.

Civ. No. 70-202.

United States District Court,
D. Maryland.
March 29, 1973.

On remand, 327 F.Supp. 608, the Special Board clarified its award in railway labor case and successful union sought award of attorney's fees. The District Court, Frank A. Kaufman, J., held that where railroad complied with award as it interpreted it, union brought court proceeding to enforce award, and court remanded case to Board for clarification, award of attorney's fees to union which was successful in having its interpretation enforced would not be made.

Application denied.

1. Federal Civil Procedure \Leftrightarrow 2737.5

If on court review after Special Board has made award in railway labor dispute and after carrier has failed to comply with award, a court enforces award in proceeding brought under statute authorizing enforcement proceeding by aggrieved employee, attorney's fees are mandated if petitioning employees succeed. Railway Labor Act, § 3, subds. 1(p, q), 2, 45 U.S.C.A. § 153, subds. 1(p, q), 2.

2. Federal Civil Procedure \Leftrightarrow 2737.5

Allowance of attorney's fees under statute authorizing such fees where aggrieved employee successfully petitioned court to enforce award in railway labor dispute insures that employees who prevail will not be deterred from realizing benefit thereof by economic burden of attorney's fees incurred thereafter in court proceedings which result in enforcement of award by court order. Railway Labor Act, § 3, subd. 1(p), 45 U.S.C.A. § 153, subd. 1(p).

3. Federal Civil Procedure \Leftrightarrow 2737.5

Policy of insuring that railway employees who prevail in labor dispute would not be deterred from realizing benefit of award by economic burden of attorney's fees incurred in court proceedings which result in enforcement of award does not obtain in case in which carrier fully complied with award as it interpreted it. carrier's interpretation was reasonable, either union or carrier could have sought clarification, union sought to have court enforce award as union interpreted it, and reviewing court determined that award was sufficiently ambiguous to require clarification by board. Railway Labor Act, § 3, subd. 1(p), 45 U.S.C.A. § 153, subd. 1(p).

4. Federal Civil Procedure \Leftrightarrow 2737.5

Where railroad complied with award as it interpreted it, union brought court proceeding to enforce award, and court remanded case to board for clarification, award of attorney's fees to union which was successful in having its inter-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
MAY 2, 1973

BETTY LEVIN, ALLEGHANY CORPORATION :
and ROBERT LEVASSEUR,

Plaintiffs, : 67 Civil 5095 (EW)
-against- : ORDER AND FINAL
MISSISSIPPI RIVER CORPORATION, : JUDGMENT
MISSOURI PACIFIC RAILROAD COMPANY, :
ROBERT H. CRAFT, T. C. DAVIS :
and THOMAS F. MILBANK, :
Defendants. :
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The parties to this action having submitted to the Court for its approval, pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure, a Stipulation of Settlement dated December 18, 1972; and

By Order dated December 20, 1972, the Court having directed that a hearing be held on January 25, 1973, to determine whether the terms and provisions of the Stipulation of Settlement were fair, reasonable, adequate and proper and should be approved, and to determine whether final judgment should be entered in accordance with the Stipulation of Settlement and having directed that notice of the settlement hearing be given to the MoPac stockholders in a manner specified in the order; and

Notice of the hearing having been given to the stockholders in accordance with the order of December 20, 1972, it having been mailed, on December 27, 1972, to all stockholders of record of defendant Missouri Pacific Railroad

Company, as of the close of business on December 26, 1972, and it having been published in the national edition of The Wall Street Journal on December 27, 1972; and

On January 25, 1973, a hearing having been held to determine whether the proposed settlement embodied in the terms and provisions of the Stipulation of Settlement should be approved and at that hearing an opportunity having been provided for all proponents of and objectors to the proposed settlement to be heard and to submit papers for the consideration of the Court; and

The Court having considered the prior proceedings in this action, and the matters submitted to it, and after due deliberation having rendered an opinion on March 19, 1973, and having determined that a final judgment should be entered; it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That the terms and provisions of the Stipulation of Settlement dated December 13, 1972, are fair, reasonable, adequate and proper to the Missouri Pacific Railroad Company and to the members of the class consisting of all of its Class B stockholders, and the same are hereby approved, as per the opinion of the Court dated March 19, 1973.

2. That the notice to the stockholders of the hearing was fair, adequate and sufficient and constituted compliance with Rules 23(e) and 23.1 of the Federal Rules of Civil Procedure.

3. That any and all objections to the terms and provisions of the Stipulation of Settlement are hereby overruled.

4. That the parties to the Stipulation of Settlement are hereby authorized and directed to consummate the settlement of this action pursuant to the terms and provisions of the Stipulation of Settlement.

Thompson
5. That the Complaint and Amended Complaint of Betty Levin, the Complaint and Amended Supplemental Complaint of Alleghany Corporation, and the Complaint of Robert LeVasseur are hereby dismissed as against all defendants on the merits, with prejudice and without costs to any party.

6. That the Court retains jurisdiction of all matters respecting the consummation of the settlement of this action pursuant to the Stipulation of Settlement and for the purpose of entertaining applications for attorneys' fees and expenses by counsel for plaintiffs Betty Levin and Robert LeVasseur and by plaintiff Alleghany Corporation.

Dated: New York, New York
MAY 2
April 1973

Edward Weinfield
EDWARD WEINFELD
U.S.D.J.

Judgment entered:
MAY 2
April 1973

Thomas E. Anthony
Acting Clerk

IN OFFICE OF CLERK
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Summed &
filed
5/7/68

BETTY LEVIN, on behalf of herself and all other holders of the Class B Common Stock of Missouri Pacific Railroad Company, and on behalf of said corporation,

Plaintiff,

ALLEGHANY CORPORATION, on behalf of itself and all other holders of the Class B Common Stock of Missouri Pacific Railroad Company,

: 67 Civ. 5095

Plaintiff-Intervenor,

: COMPLAINT OF
INTERVENOR
ALLEGHANY
CORPORATION

...against...

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,

Defendants.

Plaintiff-intervenor Alleghany Corporation ("Alleghany"), by its attorneys, alleges:

1. (a) This action was initiated on or about December 29, 1967, by plaintiff Betty Levin, a citizen of the Commonwealth of Massachusetts, on behalf of herself and all other holders of Class B Common Stock of the Missouri Pacific Railroad Corporation ("MoPac") and on behalf of MoPac.

(b) Defendant Mississippi River Corporation (formerly known as Mississippi River Fuel Corporation and hereinafter called "Mississippi") is a corporation organized under the laws of the State of Delaware, with its principal place of business in the State of Missouri.

(c) Defendant MoPac is a railroad corporation organized under the laws of the State of Missouri, with its principal place of business in the State of Missouri.

(d) Defendants Robert H. Craft ("Craft"), T. C. Davis ("Davis") and Thomas F. Milbank ("Milbank") are citizens of the State of New York.

2. Plaintiff-intervenor Alleghany is a corporation organized under the laws of the State of Maryland. At all times complained of herein, Alleghany has been, and continues to be, the beneficial owner of a majority of the outstanding shares of Class B Common Stock of MoPac. Alleghany presently is the beneficial owner of 20,753 of the 39,731 shares of Class B Common Stock of MoPac outstanding.

3. Jurisdiction of the Court is based on diversity of citizenship of the original parties. The amount in controversy is in excess of \$10,000.

4. (a) This action is brought by plaintiff and by plaintiff-intervenor on their own behalf and on behalf of all other holders of Class B Common Stock of MoPac.

(b) The Class B Common Stock of MoPac is owned by approximately 1200 persons, and joinder of all of them is impracticable. The complaints herein present questions of law and fact common to the entire class, and the claims contained in the complaints are typical of the claims of the class. The intervention as a plaintiff by Alleghany, the beneficial owner of more than 52% of the outstanding Class B Common Stock of MoPac, insures that plaintiffs will fairly and adequately protect the interests of the class.

(c) The prosecution of separate actions by individual members of the class would create the risks of

inconsistent or varying adjudications which would establish incompatible standards of conduct for defendants and of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members of the class or substantially impair or impede their ability to protect their interests. Defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

(d) The complaints herein raise questions of law and fact common to the members of the class which predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Intervening Plaintiff's First Claim

5. At all times complained of herein:

(a) The capital stock of MoPac consists and has consisted of two classes, A and B.

(b) There have been outstanding approximately 1,850,000 shares of MoPac Class A stock and 39,731 shares of MoPac Class B stock; as of March 4, 1968, there were outstanding 1,858,777 shares of MoPac Class A Stock and 39,731 shares of MoPac Class B stock.

(c) In all respects but name, MoPac Class A Stock is and has been a preferred stock.

(d) MoPac Class A Stock is and has been limited

- (i) in its dividend rights to a preferential noncumulative dividend not to exceed \$5 per share in any calendar year, and
- (ii) in its right to share in the assets of MoPac in the event of

liquidation to an amount not to exceed \$100 per share plus up to \$5 in dividends declared but not paid.

(e) MoPac Class B Stock is and has been the equity common stock of MoPac.

(f) MoPac Class B Stock is and has been entitled to reasonable dividends out of MoPac's net income available for dividends after \$5 per share has been paid on the Class A Stock in any calendar year.

(g) MoPac is and has been permitted to declare and pay dividends without limit as to amount on the Class B Stock out of net income available for dividends, after \$5 per share has been paid on the Class A Stock in any calendar year.

(h) In the event of MoPac's liquidation, the Class B Stock is and has been entitled to all earnings and assets of MoPac after payment of debts and the limited preferences of the Class A Stock, without further participation by the Class A.

6. (a) Pursuant to MoPac's charter, each share of Class A Stock and each share of Class B Stock is entitled to one vote for election of directors of MoPac.

(b) Pursuant to MoPac's charter, each class is entitled to a class vote on certain subjects (including any proposal to change or alter in any way the preferences, qualifications, limitations, restrictions or special or relative rights of either class of stock), but is not entitled to a class vote for election of directors.

(c) At all times since 1952, defendant Mississippi has owned and presently owns in excess of 52% of the outstanding Class A Stock of MoPac, constituting a majority of all the outstanding voting stock of MoPac.

(d) By virtue of its said ownership since 1962 of a majority of the outstanding voting stock of MoPac, defendant Mississippi since 1962 has had and continues to have the power to elect its nominees to MoPac's Board of Directors.

(e) At all times since 1962, nominees of defendant Mississippi in fact have been elected to and presently constitute the entire MoPac Board of Directors.

(f) At all times since 1962, a majority of members of the MoPac Board of Directors also have been and presently are directors and/or officers of defendant Mississippi.

(g) By virtue of the foregoing, MoPac is and since 1962 has been controlled by Mississippi, which presently is the owner of more than 60% of MoPac's Class A Stock and of approximately 59% of MoPac's total voting stock.

7. (a) None of the members of the MoPac Board of Directors owns any MoPac Class B Stock, except defendant Davis, who is the owner of 15 shares of Class B Stock.

(b) The members of the MoPac Board of Directors in the aggregate owned 9,594 shares of MoPac Class A Stock in 1963 and presently own in excess of 11,000 shares of MoPac Class A Stock.

(c) At all times complained of herein, defendants Craft, Davis and Milbank have been and presently are directors of MoPac.

(d) Defendants Craft and Davis are members of the Executive Committee of the MoPac Board of Directors.

(e) Defendant Craft is Chairman of the Finance Committee of the MoPac Board of Directors.

(f) Defendants Craft and Milbank are directors of defendant Mississippi.

(g) Defendant Craft is Chairman of the Finance Committee of the Board of Directors and Financial Vice President of defendant Mississippi.

8. At all times complained of herein and presently:

(a) The members of the MoPac Board of Directors, including defendants Craft, Davis and Milbank, have had and now have a duty to act in the interests of all shareholders of MoPac.

(b) Defendant Mississippi has had and now has a duty not to utilize its voting control over the composition of MoPac's Board of Directors in a manner which would cause MoPac's directors not to act in the interest of all MoPac stockholders.

9. (a) The present capital structure of MoPac is the result of reorganization of MoPac approved by the Interstate Commerce Commission and the courts in 1955-1956, pursuant to which the pre-reorganization owners of the former common stock were awarded continued ownership, after debts and preferences, of all equity in MoPac.

(b) The present Class B Stock replaced the pre-reorganization common stock of MoPac, and the present Class A Stock replaced the pre-reorganization preferred stock of MoPac.

(c) Because of MoPac's financial condition at the time of reorganization, voting control of MoPac's Board of Directors was given to the owners of the former preferred (the present Class A) rather than to the equity owners (the present Class B).

(d) At the time of MoPac's reorganization, Alleghany was the largest single owner of the outstanding common stock of MoPac, for which it received Class B Stock pursuant to the plan of reorganization.

10. (a) Since MoPac's reorganization in 1955-1956, the net equity allocable to the 39,731 shares of Class B Stock has increased so substantially that it now greatly exceeds the fixed amount to which the preferred Class A Stock is entitled in the event of liquidation.

(b) In 1956, MoPac (which then issued unconsolidated financial reports), had a net equity of \$224,544,774, of which \$187,195,700, or 83.4%, was allocable to the then outstanding 1,871,957 shares of Class A Stock, and \$37,349,074, or 16.6%, was allocable to the 40,648 outstanding shares of Class B Stock.

(c) Since 1952, MoPac (which then issued and now issues consolidated financial reports) has had the following net equity at the end of each year:

1952	\$380,178,000
1953	395,894,282
1954	414,200,607
1955	429,825,000
1956	448,765,000
1957	471,072,000

(d) During the period 1952-1957, the amount of MoPac's net worth allocable to the liquidation rights of the Class A Stock has remained constant (except for minor variations due to fluctuations in the number of Class A shares outstanding), while the equity allocable to the Class B Stock has steadily grown as follows:

	Total Amount of MoPac Net Worth Allocable to Class A.	Total Amount of MoPac Net Worth Allocable to Class B.
1962	\$184,332,600	\$195,845,400
1963	184,957,600	210,936,682
1964	185,620,100	228,580,507
1965	184,462,500	245,362,500
1966	185,297,700	263,468,300
1967	185,877,700	285,194,300

(c) As a result of the growth in MoPac's net worth as aforesaid, at the end of 1967 only 39.5% of MoPac's net worth was allocable to the Class A Stock, while 60.5% was allocable to the Class B Stock.

III. (a) Because of the differences in numbers of shares of each class outstanding and in the relative proportion of MoPac's net worth allocable to each class, at the end of 1967 each share of Class B Stock represented beneficial ownership of more than \$7,178.00 of MoPac's net worth, while each share of Class A Stock represented only \$100.

(b) At the end of 1967, each share of Class B Stock represented approximately 72 times the beneficial interest in MoPac's net worth that was represented by each share of Class A Stock.

(c) Because of the matters complained of herein, the market price of MoPac Class B Stock does not fully reflect the true value thereof.

(a) On March 27, 1968, the last day in that month on which MoPac Class A Stock was reported as having been traded on the New York Stock Exchange, Class A Stock closed at \$75.25 per share.

(e) On March 29, 1968, McPac's Class B Stock was reported as having been quoted over the counter at per share

12. (a) Since MoPac's reorganization in 1955-1956, its retained income has increased substantially.

(b) In 1955, MoPac (which then issued unconsolidated financial reports) had retained income of \$14,606,049.

(c) Since 1962, MoPac (which then issued and now issues consolidated financial reports) has had the following retained income at the end of each year:

1962	"	\$189,871,000
1963	"	205,308,000
1964	"	223,318,000
1965	"	240,136,000
1966	"	258,678,000
1967	"	280,677,000

(d) Since MoPac's retained income is in addition to assets sufficient to satisfy fully all liabilities of MoPac, including the maximum permissible distribution on Class A Stock in the event of liquidation, all \$280,677,000 of MoPac's retained income at the end of 1967 was allocable to the Class B Stock.

13. (a) The growth in the net equity of MoPac since its reorganization in 1955-1956 has been in addition to substantial annual expenditures for maintenance of and additions to the railroad's line, structures and equipment.

(b) Between 1955 and 1967, MoPac has invested approximately one and one-quarter billion dollars for maintenance of and additions to its line, structures and equipment, an average annual investment of approximately \$100 million.

(c) During the period 1961 through 1967, MoPac has spent more than \$400,000,000 to replace or modernize its plant, equipment, lines and facilities, which expenditures have

been financed primarily from earnings.

(a) The present condition of MoPac's plant, equipment, lines and facilities is excellent and is superior to most other Class I railroads in the United States.

14. (a) Even after making annual investments as aforesaid, and after meeting all other annual expenses, MoPac's annual net income after taxes has grown substantially since its reorganization in 1955-1956.

(b) In 1955, MoPac (which then issued unconsolidated financial reports) had net income after taxes of \$14,595,039.

(c) Since 1952, MoPac (which then issued and now issues consolidated financial reports) has had annual net income after taxes as follows:

1952	-	\$22,250,000
1953	-	24,958,000
1954	-	27,472,000
1955	-	26,301,000
1956	-	27,934,000
1957	-	31,481,000 (including extraordinary net income item)

(d) MoPac's annual net income after taxes in the period set forth above would have been even greater if it had not elected to charge some of its capital investment to current expenses.

15. (a) In every year since 1956, MoPac's Board of Directors has declared dividends on the Class A Stock.

(b) During the years 1956 through 1963, the annual dividends declared on MoPac's Class A Stock were less than \$5 per share, and accordingly no dividends could be paid on the Class B Stock.

(c) Commencing with 1964, annual dividends in the maximum permissible amount of \$5 per share have been declared on MoPac Class A Stock. The total amounts of these dividends, and their relation to MoPac's after tax net income, were as follows:

Year	Per Share	Total Dividends Payable to Class A	Percent of Net Income Payable to Class A
1964	\$5.00	\$9,263,000	34% ✓
1965	5.00	9,284,000	35% ✓
1966	5.00	9,243,000	33% ✓
1967	5.00	9,283,000	29% ✓

Average percentage of Net Income annually payable in dividends to the Class A 33%

16. Commencing with 1964, the Board of Directors of MoPac has declared annual dividends of \$5 per share payable on the MoPac Class B Stock. The total amounts of these dividends, and their relation to MoPac's after tax net income, were as follows:

Year	Per Share	Total Dividends Payable to Class B	Percent of Net Income Payable to Class B
1964	\$5.00	\$199,000	0.7% ✓
1965	5.00	199,000	0.8% ✓
1966	5.00	199,000	0.7% ✓
1967	5.00	199,000	0.6% ✓

Average percentage of Net Income annually payable in dividends to the Class B. . . . 0.7%

17. (a) During the period 1964 through 1967, the amount of MoPac's net worth allocable to the Class B Stock consistently has exceeded the amount of net worth allocable to the Class A Stock.

(b) During the period 1964 through 1967, the amount of dividends declared by the Board of Directors of MoPac

on the Class B Stock has totalled \$796,000, while the amount of dividends declared payable on the Class A Stock has totalled \$37,073,000.

(c) During the period 1964 through 1967, the average percentage of MoPac's net income after taxes declared payable on Class B Stock has been 0.75, while the average percentage declared payable on Class A Stock has been 3.24.

(d) During the period 1964 through 1967, the MoPac Board of Directors has declared dividends payable on the Class A Stock which have been more than forty-seven times those declared on the Class B Stock, although during the same period, the average interest of the Class A Stock in MoPac's net worth has been less than 43% and the interest of the Class B Stock more than 57%.

18. By the terms of its court-approved reorganization plan, MoPac must compute "Available Net Income" by offsetting certain fixed charges against income available for fixed charges, and must set aside certain percentages of Available Net Income for capital expenditures and for mortgage bond sinking funds and, if earned, interest on debt obligations in accordance with a formula specified in said plan. MoPac's annual net income is available for payment of dividends on its capital stock of both classes to the extent that it exceeds the amounts thus required to be set aside from Available Net Income.

19. (a) During the year 1964 (when MoPac first began paying regular annual \$5 dividends on its stock) through 1967, MoPac's net income available for dividends was reported as follows:

1964	\$ 14,554,489
1965	13,595,346
1966	15,291,799
1967	27,493,299

(b) During the period 1964-1967, the Board of Directors of MoPac declared dividends payable on the Class A Stock in amounts constituting the following percentages of MoPac's annual net income available for dividends:

1964 ..	6 $\frac{1}{2}$ %
1965 ..	68%
1966 ..	60%
1967 ..	34%

✓ Average percentage of Net Income Available for Dividends payable in dividends to the Class A . . . 52%

(c) During the period 1964-1967, after payment of maximum permissible dividends on the Class A Stock, MoPac had net income available for payment of dividends on the Class B Stock in the following amounts:

1964 ..	\$ 5,291,489
1965 ..	4,312,346
1966 ..	6,048,799
1967 ..	18,210,299

(d) During the period 1964-1967, the annual \$192,000 in dividends declared by the Board of Directors of MoPac on the Class B Stock constituted the following percentages of MoPac's annual net income available for payment of dividends on the Class B Stock:

1964 ..	4%
1965 ..	5%
1966 ..	3%
1967 ..	1%

Average percentage actually declared as dividends to the Class B from Net Income Available for Dividends remaining after payment of Class A dividends 2%

20. Since 1964, when the Board of Directors of MoPac began declaring regular annual \$5 dividends on both the Class

✓ \$9-1/4 million to the Class A and \$199 thousand to the Class B, MoPac's total retained income on a consolidated basis has risen from \$223 million in 1964 to over \$280 million in 1967, and MoPac's unappropriated retained income, on an unconsolidated basis, rose from \$71 million in 1964 to \$103 million in 1967.

21. Since 1964, when the Board of Directors of MoPac began declaring regular annual \$5 dividends on both the Class A and Class B Stocks, and limiting the Class B to \$199 thousand per year while paying approximately \$9-1/4 million per year to the Class A, at the end of each year MoPac has had on hand in excess of \$100 million in cash, temporary cash investments, special deposits and accounts receivable, on a consolidated basis, as follows:

Year	Temporary				Totals
	Cash	Investments	Special Deposits	Accounts Receivable	
1964	\$17,937,000	\$53,019,000	\$12,109,000	\$29,637,000	\$112,732,000
1965	10,222,000	62,693,000	8,829,000	28,665,000	117,409,000
1966	19,194,000	40,074,000	11,744,000	29,275,000	100,287,000
1967	27,344,000	30,916,000	9,036,000	38,885,000	106,181,000

✓ 22. (a) Of the retained income accumulated by MoPac, which ranged from \$223,318,000 in 1964 to \$280,677,000 in 1967, a substantial amount of this retained income represents an accumulation of net income available for dividends which could have been paid to the Class B stockholders during the period since 1964.

✓ (b) Of the more than \$75 million of growth in MoPac's retained income during the years 1964 through

in excess of \$53 million represents an accumulation of net income available for dividends which could have been paid to the Class B stockholders during the years 1964-1967.

(c) At the end of each year since 1964, MoPac has had liquid assets (most of which was cash) in excess of \$100 million from which dividends could have been paid to the Class B stockholders.

23. There has been no business justification for the continued failure since 1964 by MoPac's Board of Directors to declare dividends on the Class B Stock beyond the nominal amount of \$195,000 per year.

24. Since 1964, the Board of Directors of MoPac, including defendants Craft, Davis and Milbank, has failed and refused to declare dividends in excess of \$5 per share on the Class B Stock of MoPac and arbitrarily has limited dividends on the Class B Stock to the maximum permissible per share dividend payable on the Class A Stock, despite the enormous differences in equity and value between the two classes.

25. The arbitrary failure since 1964 by the Board of Directors of MoPac to pay reasonable dividends to MoPac's Class B stockholders has resulted from improper efforts by defendant Mississippi, which controls MoPac's Board of Directors, to benefit Mississippi, and the other Class A stockholders, including directors of MoPac, at the expense of the Class B stockholders.

26. Defendant Mississippi and the Board of Directors of MoPac, including defendants Craft, Davis and Milbank, have breached their fiduciary duties to MoPac and the Class B stockholders of MoPac.

27. The arbitrary failure since 1964 to pay reasonable dividends to MoPac's Class B stockholders will continue until enjoined.

28. Intervening plaintiff has no adequate remedy at law.

Intervening Plaintiff's Second Claim

29. Intervening plaintiff repeats and realleges the allegations contained in paragraphs 1 through 28 (including subparagraphs) hereof.

30. Commencing in or about 1959, defendant Mississippi began to purchase Class A Stock of MoPac for the purpose of acquiring voting control of MoPac.

31. By the end of 1962, defendant Mississippi had acquired a majority of the outstanding shares of MoPac Class A Stock, and since that time it continuously has had and continues to have voting control of MoPac.

32. Defendant Mississippi has continued to acquire shares of MoPac Class A Stock and presently owns in excess of 60% of the outstanding Class A Stock of MoPac.

33. Defendant Mississippi owns no shares of Class B Stock of MoPac.

34. Prior to December 1963, defendant Mississippi and its chief executive officer, William G. Marbury ("Marbury"), entered into a conspiracy with the members of the Board of Directors of MoPac to cause the owners of MoPac Class B Stock to surrender their shares for less than the true value thereof, and thereby benefit defendant Mississippi and other owners of MoPac Class A Stock.

35. / (c) Pursuant to said conspiracy, in 1963 defendant Mississippi caused the Board of Directors of MoPac, including defendants Croft, Davis and Milbank, to adopt a scheme which, if carried out, would appropriate for defendant Mississippi and the other Class A stockholders of MoPac, more than 50% equity owned by the Class B Stock of MoPac.

(b) The aforesaid scheme involved formation of a new corporation and the consolidation of MoPac with the Texas and Pacific Railway Company, which was then 83% owned by MoPac.

(c) The aforesaid scheme involved issuance of the same number of shares of stock in the new corporation for each outstanding share of MoPac Class A and Class B Stock, despite the fact that MoPac Class B Stock then had per share equity more than 52 times greater than Class A, and despite the fact that MoPac Class B Stock was then traded at a price per share many times greater than MoPac Class A Stock.

(d) The aforesaid scheme involved denial of the right under MoPac's charter of the Class B Stock to a separate vote by classes with respect to a merger or consolidation.

(e) The effect of the aforesaid scheme, if carried out, would have been to deprive the holders of MoPac Class B Stock of more than \$200 million of equity in MoPac, most of which would have gone to defendant Mississippi, the owner of a majority of the Class A Stock.

(f) The aforesaid scheme was not abandoned by defendant Mississippi and the Board of Directors of MoPac, including defendants Craft, Davis and Hilbank, until the United States Supreme Court unanimously held in 1967 (386 U.S., 162), that the scheme illegally violated the rights of the holders of MoPac's Class B Stock.

(g) After remand by the United States Supreme Court, the District Court (E.D. Mo.; Meredith, J.) found on January 12, 1968 that the aforesaid scheme was inherently unfair to the Class B shareholders and "would have taken from the B stockholders an equity in excess of \$200,000,000 and given to the A stockholders."

36. (a) Pursuant to said conspiracy to benefit defendant Mississippi at the expense of the Class B stockholders by causing the owners of the Class B Stock to surrender their shares at less than fair value, the defendants, notwithstanding their fiduciary duties toward all the stockholders of MoPac, have attempted to depress the market value of the Class B Stock by publicly denigrating its value.

(b) In 1963, Mississippi's and MoPac's chief executive officer, Harbury, stated for publication in "Forbes" magazine that the Class B Stock is a "second-class stock."

(c) On December 12, 1963, Harbury characterized the Class B Stock as "second best" and a second-class stock in a speech to a group of securities analysts in New York City.

(d) On other occasions, the circumstances of which are fully known to defendants and not to intervening plaintiff, Harbury has made similar derogatory statements to the financial press and other (e.g., anyone is "crazy" to pay the market price for Class B Stock), as has Downing B. Jenks, President of MoPac and a director of Mississippi (e.g., MoPac Class B Stock "isn't worth" the market price at which it sells.)

37. (a) Pursuant to said conspiracy, MoPac's Board of Directors has failed and refused to pay fair and reasonable dividends on MoPac's Class B Stock.

(b) Notwithstanding the facts that the Class B stockholders currently are the beneficial owners of over 60% of MoPac's equity and that MoPac has had available for dividends to the Class B substantially more than \$33 million it could have paid in the years 1964-1967, MoPac's management has paid a total of less than \$800,000 in dividends to the Class B stockholders during said four years, while paying a total of over \$37 million in dividends to the

Class A stockholders, whose interest is less than 40% of MoPac's total equity.

(c) The decision to limit the Class B Stock to the level of \$5 in dividends per share has not been made because of bona fide business considerations, but has been made pursuant to said conspiracy, in order to depress the market value of the Class B Stock and to induce the holders of the Class B to surrender their stock at less than its actual value, and thereby benefit defendant Mississippi and the other holders of Class A Stock.

38. The above-described conduct by defendant Mississippi and the MoPac Board of Directors in attempting to freeze out the Class B stockholders is similar to the conduct followed by them in other instances where they have acquired control of corporations in the past.

39. The aforesaid conduct by defendant Mississippi and by MoPac's Board of Directors, including the defendants Craft, Davis and Millbank, constitutes a fraud on the rights of MoPac's Class B stockholders, and has caused and is causing them grave and irreparable injury in denying them dividends to which they are entitled and in depressing the value of their stock.

40. Said fraudulent conduct is continuing and will continue unless enjoined by this Court.

41. Plaintiff-intervenor has no adequate remedy at law.

WHEREFORE, plaintiffs pray for judgment:

(1) Directing that MoPac, through its Board of Directors, declare and pay fair and reasonable dividends on the Class B Stock for each of the years 1964, 1965, 1966 and

1967, with interest thereon from the time when such dividends should have been paid;

(2) Enjoining the defendants, temporarily and permanently, from inequitably refusing to declare and pay fair and reasonable dividends on the Class B Stock in the future, and directing defendants to cause fair and reasonable dividends to be paid on the Class B Stock in the future;

(3) Awarding plaintiff-intervenor its costs and expenses of this action, including reasonable attorneys' fees;

(4) Retaining jurisdiction of this action for such period as may be necessary in order to assure compliance with the Court's order;

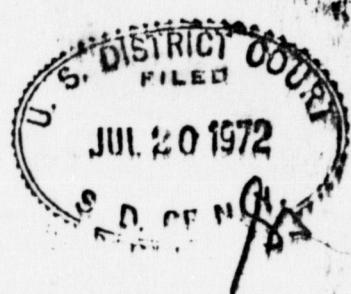
(5) Granting plaintiff-intervenor such other and further relief as may be just and equitable.

DONOVAN LEISURE NEWTON & IRVINE

By John H. D. [unclear]
A Member of the Firm

Two Wall Street
New York, New York 10005
Telephone: Rector 2-4100

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



BETTY LEVIN,

Plaintiff,

ALLEGHANY CORPORATION,

67 Civ. 5095 (EW)

Plaintiff-Intervenor,

ROBERT LEVASSEUR,

AMENDED SUPPLEMENTAL
COMPLAINT OF INTER-
VENOR ALLEGHANY
CORPORATION

Plaintiff-Intervenor,

-against-

(Class Action)

MISSISSIPPI RIVER CORPORATION, MISSOURI
PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT,
T. C. DAVIS and THOMAS F. MILBANK,

Defendants.

Plaintiff-intervenor Alleghany Corporation ("Alleghany")
by its attorneys, alleges:

1. (a) This action was initiated on or about
December 29, 1967, by plaintiff Betty Levin, a citizen of the
Commonwealth of Massachusetts, on behalf of herself and all other
holders of Class B Stock of the Missouri Pacific Railroad
Corporation ("MoPac") and on behalf of MoPac.

(b) Defendant Mississippi River Corporation
(formerly known as Mississippi River Fuel Corporation and hereinafter
called "Mississippi") is a corporation organized under the

laws of the State of Delaware, with its principal place of business in the State of Missouri.

(c) Defendant MoPac is a railroad corporation organized under the laws of the State of Missouri, with its principal place of business in the State of Missouri.

(d) Defendants Robert H. Craft ("Craft"), T. C. Davis ("Davis") and Thomas F. Milbank ("Milbank") are citizens of the State of New York.

2. Plaintiff-intervenor Alleghany is a corporation organized under the laws of the State of Maryland. At all times complained of herein, Alleghany has been, and continues to be, the beneficial owner of a majority of the outstanding shares of Class B Common Stock of MoPac. Alleghany presently is the beneficial owner of 21,243 of the 39,731 shares of Class B Common Stock of MoPac outstanding.

3. Jurisdiction of the Court is based on diversity of citizenship of the original parties. The amount in controversy is in excess of \$10,000.

4. (a) This action is brought by plaintiff derivatively and by plaintiff and by plaintiff-intervenor on their own behalf and on behalf of all other holders of Class B Stock of MoPac.

(b) The Class B Stock of MoPac is owned by approximately 1200 persons, and joinder of all of them is impracticable. The complaints herein present questions of law and fact common to the entire class, and the claims contained in the complaints are typical of the claims of the class. The intervention as a plaintiff by Alleghany, the beneficial owner of more than 52% of the outstanding Class B Stock of MoPac,

insures that plaintiffs will fairly and adequately protect the interests of the class.

(c) The prosecution of separate actions by individual members of the class would create the risks of inconsistent or varying adjudications which would establish incompatible standards of conduct for defendants, and of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members of the class or substantially impair or impede their ability to protect their interests. Defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

(d) The complaints herein raise questions of law and fact common to the members of the class which predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Intervening Plaintiff's First Claim

5. At all times complained of herein:

(a) The capital stock of MoPac consists and has consisted of two classes, A and B.

(b) There have been outstanding approximately 1,850,000 shares of MoPac Class A stock and 39,731 shares of MoPac Class B stock; as of December 31, 1971, there were outstanding 1,864,052 shares of MoPac Class A Stock and 39,731 shares of MoPac Class B stock.

of either class of stock), but . . . not entitled to a class vote for election of directors.

(c) At all times since 1962, defendant Mississippi has owned and presently owns in excess of 52% of the outstanding Class A Stock of MoPac, constituting a majority of all the outstanding voting stock of MoPac.

(d) By virtue of its said ownership since 1962 of a majority of the outstanding voting stock of MoPac, defendant Mississippi since 1962 has had and continues to have the power to elect its nominees to MoPac's Board of Directors.

(e) At all times since 1962, nominees of defendant Mississippi in fact have been elected to and presently constitute the entire MoPac Board of Directors.

(f) At all times since 1962, a majority of members of the MoPac Board of Directors also have been and presently are directors and/or officers of defendant Mississippi.

(g) By virtue of the foregoing, MoPac is and since 1962 has been controlled by Mississippi, which presently is the owner of more than 60% of MoPac's Class A Stock and of approximately 59% of MoPac's total voting stock.

7. (a) None of the members of the MoPac Board of Directors owns any MoPac Class B Stock.

(b) The members of the MoPac Board of Directors in the aggregate owned 9,594 shares of MoPac Class A Stock in 1963 and presently own in excess of 11,000 shares of MoPac Class A Stock.

(c) At all times complained of herein, defendants Craft, Davis and Milbank have been and presently are directors

of MoPac.

(d) Defendants Craft and Davis are members of the Executive Committee of the MoPac Board of Directors.

(e) Defendant Craft is Chairman of the Finance Committee of the MoPac Board of Directors.

(f) Defendants Craft and Milbank are directors of defendant Mississippi.

(g) Defendant Craft is Chairman of the Board of Directors of defendant Mississippi.

8. At all times complained of herein and presently:

(a) The members of the MoPac Board of Directors, including defendants Craft, Davis and Milbank, have had and now have a duty to act in the interests of all shareholders of MoPac.

(b) Defendant Mississippi has had and now has a duty not to utilize its voting control over the composition of MoPac's Board of Directors in a manner which would cause MoPac's directors not to act in the interest of all MoPac stockholders.

9. At the time of MoPac's reorganization, Alleghany was the owner of 48% of the outstanding common stock of MoPac, for which it received Class B Stock pursuant to the plan of reorganization.

10. (a) Since MoPac's reorganization in 1955-1956, the net equity allocable to the 39,731 shares of Class B Stock has increased so substantially that it now greatly exceeds the fixed amount to which the preferred Class A Stock is entitled in the event of liquidation.

(b) In 1956, MoPac (which then published only unconsolidated financial statements), had a net equity of \$224,544,774, of which \$187,195,700, or 83.4%, was allocable to

the then outstanding 1,871,957 shares of Class A Stock, and \$37,349,074, or 16.6%, was allocable to the 40,648 outstanding shares of Class B Stock.

(c) During the period from 1962, when MoPac first published consolidated financial statements, through 1971, the amount of MoPac's net worth, as reported by it to its stockholders, allocable to the liquidation rights of the Class A Stock has remained constant (except for minor variations due to fluctuations in the number of Class A shares outstanding), while the net worth allocable to the Class B Stock has steadily grown as follows:

	<u>Total Net Worth</u>	<u>Net Worth Allocable to Class A</u>	<u>Net Worth Allocable to Class B</u>
1962 -	\$380,178,000	\$184,332,600	\$195,845,400
1963 -	395,894,282	184,957,600	210,936,682
1964 -	414,200,607	185,620,100	228,580,507
1965 -	429,825,000	184,462,500	245,362,500
1966 -	448,766,000	185,297,700	263,468,300
1967 -	471,072,000	185,877,700	285,194,300
1968 -	485,659,000	186,157,700	299,501,300
1969 -	497,937,000	186,335,200	311,601,800
1970 -	510,010,000	186,355,200	323,654,800
1971 -	517,860,000	186,405,200	331,454,800

(d) At the end of 1962, 48% of MoPac's Net Worth was allocable to the Class A Stock and 52% to the Class B stock, but as a result of the growth in MoPac's net worth, by the end of 1971 only 36% of MoPac's net worth was allocable to the Class A Stock, while 64% was allocable to the Class B Stock.

11. (a) At the end of 1971 each share of Class B Stock represented beneficial ownership of over \$8,300 of MoPac's net worth, while each share of Class A Stock represented only \$100.

(b) On June 30, 1972, MoPac Class A Stock closed at \$70 per share on the New York Stock Exchange.

(c) On June 30, 1972, MoPac's Class B Stock was quoted over the counter at per share prices of \$1,100 bid, \$1,175 asked.

(d) Because of the matters complained of herein, the market price of MoPac Class B Stock does not fully reflect the true value thereof.

12. (a) Since MoPac's reorganization in 1955-1956, its retained income has increased substantially.

(b) In 1955, MoPac (which then published only unconsolidated financial reports) reported retained income of \$14,606,049.

(c) Since 1962, MoPac (which then published and now publishes consolidated financial statements) reported to its shareholders the following retained income at the end of each year:

1962	-	\$189,871,000
1963	-	205,308,000
1964	-	223,318,000
1965	-	240,136,000
1966	-	258,678,000
1967	-	280,677,000
1968	-	293,535,000
1969	-	306,081,000
1970	-	318,145,000
1971	-	325,965,000

(d) Since MoPac's retained income is in addition to assets sufficient to satisfy fully all liabilities of MoPac,

1964	-	0.5%
1965	-	0.4%
1966	-	0.4%
1967	-	0.3%
1968	-	0.3%
1969	-	0.3%
1970	-	0.3%
1971	-	0.3%

Average - 0.35%

20. Since 1964, when the Board of Directors of MoPac began declaring dividends of \$5 on both the Class A and Class B Stocks in each year which totalled \$9,250,000 on the Class A and \$199,000 on the Class B, MoPac's total retained income on a consolidated basis as reported to the stockholders has risen from \$223 million in 1964 to over \$325 million in 1971, and MoPac's unappropriated retained income, on an unconsolidated basis, as reported to the Interstate Commerce Commission, rose from \$71 million in 1964 to \$108 million in 1971.

21. Since 1964 when the Board of Directors of MoPac began declaring \$5 in dividends in each year on both the Class A and Class B Stocks, and limiting the Class B to \$199,000 per year while paying approximately \$9,250,000 per year to the Class A MoPac has, at the end of each year, reported to its stockholders in excess of \$97,000,000 in cash, temporary cash investments, special deposits and accounts receivable, on a consolidated basis, as follows:

<u>Year</u>	<u>Cash</u>	<u>Temporary Cash Investments</u>	<u>Special Deposits</u>	<u>Accounts Receivable</u>	<u>Totals</u>
1964	\$17,937,000	\$53,049,000	\$12,109,000	\$29,637,000	\$112,732,000
1965	10,222,000	69,693,000	8,829,000	28,665,000	117,409,000
1966	19,194,000	40,074,000	11,744,000	29,275,000	100,207,000
1967	27,344,000	30,916,000	9,036,000	38,885,000	105,101,000
1968	25,112,000	14,749,000	8,824,000	48,383,000	97,060,000
1969	25,410,000	15,641,000	9,831,000	57,760,000	108,642,000
1970	19,849,000	32,925,000	9,063,000	51,959,000	113,796,000
1971	23,843,000	42,126,000	8,328,000	51,091,000	125,300,000

22. Since 1964, the Board of Directors of MoPac, including defendants Craft, Davis and Milbank, has failed and refused to declare dividends in excess of \$5 per share on the Class B Stock of Mopac and has arbitrarily limited dividends on the Class B stock to the maximum permissible per share dividend payable on the Class A Stock, despite the aforesaid enormous differences in equity and value between the two classes.

23. There has been no business justification for the continued failure since 1964 by MoPac's Board of Directors to declare dividends on the Class B Stock beyond the nominal amount of \$199,000 per year.

24. The arbitrary failure since 1964 by the Board of Directors of MoPac to pay reasonable dividends to MoPac's Class B stockholders was part of an unlawful scheme by defendant Mississippi, which controls MoPac's Board of Directors, to benefit Mississippi and the other Class A stockholders, including director of MoPac, at the expense of the Class B stockholders.

25. Defendant Mississippi and the Board of Directors of MoPac, including defendants Craft, Davis and Milbank, have breached

their fiduciary duties to MoPac and the Class B stockholders of MoPac.

26. The arbitrary failure since 1964 to pay reasonable dividends to MoPac's Class B stockholders will continue unless enjoined.

27. Intervening plaintiff has no adequate remedy at law.

Intervening Plaintiff's Second Claim

28. Intervening plaintiff repeats and realleges the allegations contained in paragraphs 1 through 27 (including subparagraphs) hereof.

29. Commencing in or about 1959, defendant Mississippi began to purchase Class A Stock of MoPac for the purpose of acquiring voting control of MoPac.

30. By the end of 1962, defendant Mississippi had acquired a majority of the outstanding shares of MoPac Class A Stock, and since that time it continuously has had and continues to have voting control of MoPac.

31. Defendant Mississippi has continued to acquire shares of MoPac Class A Stock and presently owns in excess of 60% of the outstanding Class A Stock of MoPac.

32. Defendant Mississippi owns no shares of Class B Stock of MoPac.

33. Prior to December 1963, defendant Mississippi and its then chief executive officer, William G. Marbury ("Marbury") entered into a conspiracy with the members of the Board of Directors of MoPac to cause the owners of MoPac Class B Stock to

surrender their shares for less than the true value thereof, and thereby benefit defendant Mississippi and other owners of MoPac Class A Stock.

34. (a) Pursuant to said conspiracy, in 1963 defendant Mississippi caused the Board of Directors of MoPac, including Defendants Craft, Davis and Milbank, to adopt a scheme which, if carried out, would appropriate for defendant Mississippi and the other Class A stockholders of MoPac, more than 95% of the equity owned by the Class B Stock of MoPac.

(b) The aforesaid scheme involved formation of a new corporation and the consolidation of MoPac with the Texas and Pacific Railway Company, which was then 83% owned by MoPac.

(c) The aforesaid scheme involved issuance of the same number of shares of stock in the new corporation for each outstanding share of MoPac Class A and Class B Stock, despite the fact that MoPac Class B Stock then had per share equity more than 52 times greater than Class A, and despite the fact that MoPac Class B Stock was then traded at a price per share many times greater than MoPac Class A Stock.

(d) The aforesaid scheme involved denial of the right to a class vote with respect to a merger or consolidation.

(e) The effect of the aforesaid scheme, if carried out, would have been to deprive the holders of MoPac Class B Stock of more than \$200 million of equity in MoPac, most of which would have gone to defendant Mississippi, the owner of a majority of the Class A Stock.

(f) The aforesaid scheme was not abandoned by defendant Mississippi and the Board of Directors of MoPac, including defendants, Craft, Davis and Milbank, until the United States Supreme Court unanimously held in 1967, 386 U.S. 162, that the

scheme illegally violated the rights of the holders of MoPac's Class B Stock.

(g) After remand by the United States Supreme Court the District Court (E.D. Mo.; Meredith, J.) found on January 12, 1968 that the aforesaid scheme was inherently unfair to the Class B shareholders and "would have taken from the B stockholders an equity in excess of \$200,000,000 and given it to the A stockholders."

35. (a) Further pursuant to said conspiracy to benefit defendant Mississippi at the expense of the Class B stockholders by causing the owners of the Class B Stock to surrender their shares at less than fair value, the defendants, notwithstanding their fiduciary duties toward all the stockholders of MoPac, have attempted to depress the market value of the Class B Stock by publicly denigrating its value.

(b) In 1963, Mississippi's and MoPac's then chief executive officer, Marbury, stated for publication in "Forbes" magazine that the Class B Stock is a "second-class stock."

(c) On December 12, 1963, Marbury characterized the Class B Stock as "second best" and a second-class stock in a speech to a group of securities analysts in New York City.

(d) On other occasions, the circumstances of which are fully known to defendants and not to intervening plaintiff, Marbury made similar derogatory statements to the financial press and others (e.g., anyone is "crazy" to pay the market price for Class B Stock), as has Downing B. Jenks, Chief Executive Officer of MoPac and President of Mississippi (e.g., MoPac Class B Stock "isn't worth" the market price at which it sells).

36. (a) Pursuant to said conspiracy, MoPac's Board of Directors has failed and refused to pay fair and reasonable dividends on MoPac's Class B Stock.

(b) Notwithstanding the facts that the Class B stockholders at the end of 1971 are the beneficial owners of over 64% of MoPac's equity and that MoPac has, as alleged in paragraph 18, \$72,531,000 available for dividends for the Class B, MoPac's management paid a total of \$199,000 dividends to the Class B stockholders, while paying \$9,250,000 to Class A stockholders whose interest is less than 36% of the equity.

(c) The decision to limit the Class B Stock to the level of \$5 in dividends per share has not been made because of bona fide business considerations, but has been made pursuant to said conspiracy, in order to depress the market value of the Class B Stock and to induce the holders of the Class B to surrender their stock at less than its actual value, and thereby benefit defendant Mississippi and the other holders of Class A Stock.

37. The aforesaid conduct by defendant Mississippi and by MoPac's Board of Directors, including the defendants Craft, Davis and Milbank, constitutes a fraud on the Class B stockholders and has caused and is causing them grave and irreparable injury in denying them dividends to which they are entitled and in depressing the value of their stock.

38. Said fraudulent conduct is continuing and will continue unless enjoined by this Court.

39. Plaintiff-intervenor has no adequate remedy at law.

Intervening Plaintiff's Third Claim

40. Intervening plaintiff repeats and realleges the allegations contained in paragraph 28 through 38 (including sub-

paragraphs) hereof, and further alleges that:

41. In furtherance of the conspiracy to cause the owners of MoPac Class B Stock to surrender their shares for less than the true value thereof, the defendants, together with Harbury and the Boards of Directors of MoPac and Mississippi, by means of interstate commerce, the mails and the facilities of national securities exchanges, have engaged in a continuous course of manipulative and deceptive conduct. This conduct includes, inter alia, the making of untrue statements of material fact, and omissions to state material facts necessary in order to render statements made by them not misleading. This course of conduct has operated as a fraud and deceit both upon the plaintiffs and the Class B stockholders represented by them, and upon those members of the investing public at large who bought and sold shares of MoPac A and B Stock during that period. This conduct commenced prior to 1963 and continues to the present.

42. As part of said course of manipulative and deceptive conduct the defendants and their aforesaid co-conspirators performed each of the acts described in paragraphs 34 through 36 (including subparagraphs) above.

In addition:

43. The defendants and their aforesaid co-conspirators have caused to be distributed to the stockholders of MoPac, through the mails and in interstate commerce, annual reports, and various other writings and communications containing false and misleading statements of material facts, and omissions of material facts, including the following:

(a) a statement that MoPac's plan for consolidation with the T & P would produce economies of operation when defendants knew that no substantial economies of operation could be realized from the plan;

(b) failure to disclose that the true motive of defendants and of all the directors of MoPac, in proposing said plan, was to appropriate almost 98% of the equity of the Class B Stockholders to the Class A Stock;

(c) Statements showing annual per-share earnings for the Class A Stock as \$6.72 in 1961, \$12.07 in 1962, \$13.34 in 1963, \$13.66 in 1964, \$14.26 in 1965 and \$14.43 in 1966, whereas in fact, as found by the United States Supreme Court and as specified in MoPac's charter and as defendants well knew, the Class A Stock is limited to a maximum dividend right of \$5 per year as and if declared, and has no equity rights whatsoever beyond the stated value of \$100 per share, amounting in total to approximately \$185,000,000 for all Class A shares, which amount was more than covered by the surplus account of the corporation during the aforesaid years;

(d) failure, during the same years aforesaid in subparagraph (c) above, to state any earnings per share whatsoever for the Class B Stock, which is the sole stock entitled to share in the residual equity of the corporation, clearly including all annual earnings over and above \$5 per share of Class A Stock.

(e) failure, for the years 1967 to the present, to report any per share earnings whatsoever for any of MoPac's stocks, despite the opinion of the Accounting Principles Board that such information is highly significant to investors and should be prominently reported in financial statements.

(f) failure to report to MoPac's stockholders and the investing public that the reason for MoPac's discontinuance of its past practice of reporting earnings per share of Class A Stock by attributing all earnings to the Class A and none to the Class B was that the Securities and Exchange Commission had informed MoPac that such reporting was incorrect and improper.

44. Had the earnings figures referred to in subparagraphs (c) and (d) been correctly and honestly stated, they would have shown the following earnings per share of Class B Stock for each of the years 1961 through 1966: \$60.50 in 1961, \$326 in 1962, \$333 in 1963, \$405 in 1964, \$420 in 1965 and \$441 in 1966.

45. The foregoing conduct was part of a plan and conspiracy conceived and carried out by defendants and their co-conspirators, to create an impression in the minds of the Class B shareholders and the investing public at large, by means of mis-reporting earnings and withholding dividends and otherwise, that the Class B Stock was far less valuable than was the fact, in order thereby to drive down the market price of the Class B and enable defendants to force its surrender, purchase it and destroy its equity in MoPac.

46. During the period of said conspiracy, defendants Mississippi and T. C. Davis bought and sold shares of MoPac's Class B Stock.

47. During the period of said conspiracy, plaintiff Alleghany made purchases of MoPac Class B Stock.

48. The aforesaid conduct of defendants and their co-conspirators was and is in violation of state and federal statutes (including section 10(b) of the Securities Exchange Act of 1934)

and their common law fiduciary duty.

WHEREFORE, plaintiffs pray for judgment:

(1) Directing that MoPac, through its Board of Directors, declare and pay fair and reasonable dividends on the Class B Stock for the year 1964 and for each of the years thereafter through 1971 with interest thereon from the time when such dividends should have been paid; or, in the alternative, awarding plaintiffs and all members of the class represented by them, damages against each of the defendants in the amount of the injury suffered by them during the years 1964 through 1971 as measured by the amount of reasonable dividends withheld by defendants pursuant to the fraudulent scheme complained of herein, with interest thereon from the time when such dividends should have been paid;

(2) Enjoining the defendants, temporarily and permanently, from inequitably refusing to declare and pay fair and reasonable dividends on the Class B Stock in the future, and directing defendants to cause fair and reasonable dividends to be paid on the Class B Stock in the future;

(3) Awarding plaintiff-intervenor its cost and expenses of this action, including reasonable attorneys' fees;

(4) Retaining jurisdiction of this action for such period as may be necessary in order to assure compliance with the Court's order;

(5) Granting plaintiff-intervenor such other and further relief as may be just and equitable.

July 14, 1972

DONOVAN LEISURE NEWTON & IRVING

By 
M. Michael Miller
A Member of the Firm

Two Wall Street
New York, New York 10005
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

BETTY LEVIN, on behalf of herself and all other holders of the Class B Common Stock of Missouri Pacific Railroad Company, and on behalf of said corporation,

Plaintiff,

67 Civ. 5095 (E.W.)

-against-

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CRAFT, T. C. DAVIS and
THOMAS F. MILBANK,

AMENDED
COMPLAINT

(Class Action)

Defendants.

-----x

Plaintiff alleges upon information and belief (except that paragraphs 2(a) through (d), 2(g), 3(h), 14(d) through (f), and 14(h) and (i) are alleged upon knowledge):

FIRST COUNT

1. (a) Defendant MISSISSIPPI RIVER CORPORATION (formerly known as Mississippi River Fuel Corporation, and herein-after called Mississippi) is a corporation organized under the laws of Delaware.

(b) Defendant MISSOURI PACIFIC RAILROAD COMPANY ("MoPac") is a corporation organized under the laws of Missouri.

(c) MoPac is a common carrier by railroad, and operates lines of railroad in interstate commerce.

(d) MoPac is controlled by Mississippi.

(e) Mississippi and MoPac jointly maintain offices in the City, County, and State of New York, occupying the entire forty-third floor of the building at 20 Exchange Place, New York, New York. MoPac also maintains offices at 225 Broadway, New York, New York.

(f) Defendant ROBERT H. CRAFT is Chairman of the Board of Directors, member of the Finance and Executive Committees, and former Financial Vice President of Mississippi, and a director (since 1956), Chairman of the Finance Committee, and a member of the Executive Committee of MoPac.

(g) Defendant ROBERT H. CRAFT is a citizen of New York, and maintains his office with Mississippi and MoPac at 20 Exchange Place, New York, New York.

(h) Defendant THOMAS F. MILBANK was (from 1961 to 1970) a director and member of the Executive Committee of Mississippi, and was (from 1962 to 1970) and is now a director of MoPac.

(i) Defendant THOMAS F. MILBANK is a citizen of New York, and maintains an office at 41 East 42nd Street, New York, New York.

(j) Defendant T.C. DAVIS is a director (since 1941), member of the Executive Committee, and former Chairman of the Board of MoPac.

(k) Defendant T.C. DAVIS is a citizen of New York, and maintains an office at 230 Park Avenue, New York, New York.

2. (a) Plaintiff is, and was at the times of the matters complained of in paragraph 11 hereof, the owner and holder of 320 shares of Class B Common Stock of MoPac, and, at the times of all other matters complained of herein, was the owner and holder of not less than 85 shares of said stock.

(b) The amount in controversy, exclusive of interest and costs, exceeds the sum of \$10,000 with respect to the named plaintiff.

(c) Plaintiff is a citizen of the Commonwealth of Massachusetts.

(d) Plaintiff brings this action on behalf of herself, representatively on behalf of all other holders of Class B Common Stock of MoPac, and derivatively on behalf of MoPac.

(e) There are about 1,200 holders of Class B Common Stock of MoPac. About 52% of the MoPac Class B stock is owned by Alleghany Corporation, a Maryland corporation whose principal place of business is in New York City.

(f) The MoPac Class B stockholders are so numerous as to make it impracticable to join them all and bring them all before the Court; there are questions of law and fact common to the class; the claims of plaintiff are typical of the claims of the class; the defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole; and plaintiff will fairly insure the adequate representation of all members and will fairly and adequately protect the interests of the class.

(g) This action is not brought collusively to confer upon this Court jurisdiction that it would not otherwise have.

3. (a) MoPac's outstanding capital stock consists of about 1,860,000 shares of Class A stock and 39,731 shares of Class B stock; as of December 31, 1971, there were outstanding 1,864,052 shares of MoPac Class A stock and 39,731 shares of MoPac Class B stock.

(b) MoPac's capital stock was issued pursuant to a plan of reorganization confirmed and consummated in proceedings under Section 77 of the Bankruptcy Act, from which proceedings MoPac emerged as of January 1, 1955.

(c) MoPac's Class A stock replaced its former (pre-

reorganization) preferred stock, and its Class B stock replaced its former common stock. Immediately prior to the reorganization, MoPac's outstanding capital stock consisted of 701,901 shares of 5% cumulative preferred and 813,143 shares of common stock. Under the plan of reorganization, each share of old preferred (with its claim to accrued dividends) was exchanged for 2.645 shares of new Class A stock, and each 20 shares of old common was exchanged for one share of new Class B stock.

(d) MoPac's Class A stock is preferentially entitled to non-cumulative dividends, when and as declared by the Board of Directors, not to exceed \$5 per share in any calendar year, and in the event of any liquidation or dissolution or winding up of MoPac, to assets not to exceed \$100 per share together with any dividends declared but not paid on the Class A stock.

(e) MoPac's Class B stockholders are "entitled . . . to all residual earnings after payment of dividends on the new class A stock", as the Interstate Commerce Commission ("ICC") stated in approving the plan of reorganization (290 ICC 477, 600).

(f) MoPac's Class B stock is entitled to all the earnings and the equity in excess of the Class A preferences.

(g) In the election of directors of MoPac, each Class A share and each Class B share has one vote, and the stockholders have cumulative voting rights. By reason of the larger number of outstanding shares of Class A than of Class B stock, the Class A stock has about 98 per cent and the Class B stock has about 2 per cent of the voting power for the election of directors. The Class B stockholders thus do not have sufficient votes to elect any director.

(h) The respective rights and privileges of the Class A and Class B stocks are set forth in Article VII D of MoPac's Articles of Association, a true copy of which Article is attached hereto as Exhibit A.

(i) The MoPac Class A stock is listed and traded on the New York Stock Exchange; the MoPac Class B stock is traded in the over-the-counter market, principally in New York City.

4. (a) Mississippi now owns about 1,157,000 shares of the MoPac Class A stock, constituting about 62 per cent of the Class A stock and 61 per cent of the total number of outstanding shares entitled to vote for directors of MoPac.

(b) Mississippi owned no MoPac stock or securities at the time of the MoPac reorganization, nor for several years thereafter.

(c) In 1958, William G. Marbury, then and until his death in 1971 Chairman of the Board and Chief Executive Officer of Mississippi, became a director of MoPac, and the annual dividend on the MoPac Class A stock was reduced to \$2.40 per share (60 cents per quarter), down from \$4.10 for the previous year.

(d) Mississippi then began its acquisitions of MoPac Class A stock, and the dividend thereon was kept at 60 cents per share per quarter until Mississippi had acquired more than one million shares thereof: 247,200 by the end of 1959 (13% of the total number of voting shares of MoPac, and the largest number held by a single stockholder); 474,400 (25% of said total) by the end of 1960; 605,700 (32% of said total) by the end of 1961; 980,000 (52% of said total) by the end of 1962; and 1,071,895 (57% of said total) by the end of 1963.

(e) In December 1963, a special dividend was declared on the MoPac Class A stock, raising the total dividends for that year to \$4.00 per share of Class A stock.

(f) From 1964 through 1971, the maximum dividend of \$5.00 per share per year has been paid on the Class A stock.

(g) Mississippi controls and dominates the affairs of MoPac, and has done so throughout the period when the matters complained of by plaintiff occurred.

(h) Mississippi nominated and caused the election of each of the MoPac directors, including the individual defendants.

(i) None of the MoPac directors has been elected by the Class B stockholders, who are excluded from representation on the board of directors.

(j) There is interlocking of the directors and officers of Mississippi and MoPac. Five individuals serve as directors of both Mississippi and MoPac, and also serve as officers or members of the Executive or Finance Committees of one or both corporations.

(k) Neither Mississippi nor any director of MoPac owns any MoPac Class B stock.

5. At the ends of the years of 1964 through 1971, the MoPac consolidated shareholders' equity was as follows:

Year (at Dec. 31)	Capital Stock Class A	Capital Stock Class B	Capital Surplus	Retained Income	Total Shareholders' Equity
1964	\$185,620,100	\$3,973,100	\$1,289,832	\$223,317,575	\$414,200,607
1965	184,462,500	3,973,100	1,253,533	240,136,157	429,825,290
1966	185,297,700	3,973,100	817,321	258,677,477	448,765,598
1967	185,877,700	3,973,100	544,000	280,677,000	471,071,800
1968	186,157,700	3,973,100	1,993,000	293,535,000	485,658,800
1969	186,335,200	3,973,100	1,548,000	306,081,000	497,937,300
1970	186,355,200	3,973,100	1,537,000	318,145,000	510,010,300
1971	186,405,200	3,973,100	1,517,000	325,965,000	517,860,300

Copies of MoPac's consolidated balance sheets covering said dates are attached hereto as Exhibit B.

6. As of December 31, 1971, the equity of each share of the MoPac Class A stock was \$100 (the maximum to which it is permanently limited), and the equity of each share of the MoPac Class B stock was \$8,342.

7. During each of the eight years 1964 through 1971, the consolidated net income of MoPac has averaged at least \$24.3 million. Copies of MoPac's statements of consolidated income covering said years are attached hereto as Exhibit C.

8. During the eight years 1964 through 1971, the residual consolidated net income on the MoPac Class B stock (i.e., after payment of maximum dividends of \$5 per share on the Class A stock) was not less than as follows:

Year	Consolidated Net Income	Dividends on Class A Stock	Residual Earnings on Class B Stock	Earnings Per Share on Class B Stock (39,731 shares)
1964	\$27,472,000	\$9,263,000	\$18,209,000	\$458
1965	26,301,000	9,284,000	17,017,000	428
1966	27,984,000	9,243,000	18,741,000	474
1967	30,373,000*	9,283,000	21,095,000	556
[This action commenced December 29, 1967]				
1968	22,128,000*	9,302,000	12,826,000	323
1969	21,287,000	9,314,000	11,973,000	301
1970	21,580,000	9,317,000	12,263,000	302
1971	17,338,000*	9,319,000	8,019,000	204

*Including extraordinary items.

9. (a) MoPac's financial condition is sound. As set forth on page 2 of the MoPac Annual Report for 1966 and pages 2 and 3 of the MoPac Annual Report for 1971, copies of which pages are attached hereto as Exhibit D:

(i) The MoPac system in 1971 achieved new peaks in gross revenues and freight ton-miles, and continued to prosper and grow.

(ii) MoPac has carried out a continuous program of modernization of its system. During the past decade, MoPac invested more than \$650,000,000 in system improvements and additions; and the railroad is in excellent condition.

(b) MoPac continued its improvement program in 1971, and has projected further substantial investments in new equipment in 1972.

(c) MoPac ended each of the eight years 1964 through 1971 with surplus, current and total assets, and cash and temporary cash investments in very substantial amounts, as set forth in Exhibit B hereto.

(d) In each of the eight years 1964 through 1971, MoPac was in sound financial condition as measured by MoPac's operating ratio, rate of return on net worth, and rate of return on net investment in transportation property.

(e) MoPac's long-term outlook continues to be bright.

10. In breach of its fiduciary obligations to MoPac and to MoPac's Class B Stockholders, Mississippi, acting in concert with the individual defendants and the other directors of Mississippi and MoPac, has entered upon, and is in the process of carrying out, an unlawful scheme to enrich itself by depriving MoPac's Class B stockholders of their rightful share of MoPac's earnings, and by destroying the Class B stockholders' valuable residual equity in MoPac, as hereinafter alleged.

11. (a) In each of the years 1964 through 1971, full dividends of about \$9.3 million were paid on the MoPac Class A stock (at the maximum rate of \$5 per share).

(b) In each of the years 1964 through 1971, dividends of \$198,655 were paid on the Class B stock (at the rate of \$5 per share), a distribution amounting to approximately one percent of the residual earnings for such stock.

(c) Since MoPac emerged from reorganization, (i) dividends on the Class A stock have aggregated about \$114 million, (ii) residual earnings (after dividends on the Class A stock) have aggregated about \$245 million, (iii) retained income has aggregated more than \$500 million, and (iv) no dividends have been paid on the Class B stock other than those referred to in the immediately preceding subparagraph hereof.

(d) Said dividends on the Class B stock are grossly inadequate in the circumstances of MoPac's financial and physical condition, earnings, business conditions and prospects, and ability to pay dividends, as set forth in paragraphs 5 through 9 hereinabove.

(e) Said dividends are grossly inadequate when measured by the prevailing dividend policies and practices of comparable railroads.

(f) MoPac has accumulated and is accumulating surplus over and above what is requisite for the payment of current expenses of the business and for discharging obligations to creditors, and over and above what reasonable prudence would require to be kept in the treasury to meet the accidents, risks, and contingencies incident to the business of operating the railroad system.

(g) The inadequacy of the dividends declared on the Class B stock was protested at the time of the first declaration, in December 1964, and payment of adequate dividends on the

Class B stock was then demanded of the MoPac board of directors. The individual defendants were then, as now, members of said board. Further demand upon the board of directors of MoPac is unnecessary and would be futile, because the directors who engaged in the transactions and conduct complained of herein comprise the entire board of directors of MoPac, most of them were members of said board when said demand was made in 1964, and all of them were elected and are dominated by the defendant Mississippi.

12. Prior to Mississippi's acquisition of control of MoPac:

(a) When defendant T. C. DAVIS was Chairman of the Board of MoPac, he wrote to the MoPac stockholders as follows:

"There is no reason why full dividends should not be paid on the preferred [Class A] stock and large dividends paid on the common [Class B] stock."

(b) A former Chief Executive Officer of MoPac, the late P. J. Neff, testified that prudent management ought to cause a good, well-operated railroad, specifically including MoPac, to pay out sixty percent of its earnings as dividends, and that that would constitute a fair and reasonable distribution.

13. In pursuance of said unlawful scheme and in order to enrich Mississippi at the expense of MoPac and the Class B stockholders of MoPac and for the purpose of diverting to Mississippi as a Class A stockholder the funds which belong to the Class B stockholders and which have not been paid to them as a result of the policies set forth in paragraphs 10 and 11 hereof, Mississippi and said directors embarked upon a plan described by a Justice of the United States Supreme Court as "one of the most notorious pieces of predatory finance I have seen - and I have seen quite a few."

14. (a) In December 1963, the directors of MoPac, all elected by Mississippi, unanimously approved a so-called Plan of Consolidation (the "Plan") that would have stripped the Class B stockholders of more than \$200 million of their then equity and practically all of their future earnings, reducing their 100% residual interest to 2%. Under the Plan, most of these tremendous values and rights belonging to the Class B stockholders would have been taken over by Mississippi, and the limitations and restrictions on the Class A's right to participate in earnings and equity would have been eliminated.

(b) The Plan provided that MoPac and one of its present subsidiaries would be consolidated with a new subsidiary created to be the surviving corporate entity. Notwithstanding the vast differences in the rights and values of MoPac's two classes of stock, the Plan would have treated identically all the shares of both classes: The Plan required that each MoPac share of each class, A and B without distinction, be surrendered for four shares of the new subsidiary's single class of common stock. All the present MoPac stock would be cancelled, and MoPac would cease to exist as a corporate entity. Since the MoPac Class A shares outnumber the MoPac Class B shares by 93 to 2, the proposed exchange would have shifted almost all of the Class B's 100% residual equity and earnings to the Class A stockholders, principally Mississippi.

(c) Defendants announced publicly, and represented to the ICC, that the Plan required approval ' a collective vote, not a class vote, of the MoPac stockholders, and that such collective vote would be held at the annual MoPac stockholders' meeting in 1964 or at an earlier special meeting.

(d) Several Class B stockholders sued to enjoin the Plan as a fraud on the Class B stockholders in violation of

the fiduciary obligations of defendants Mississippi and the directors of MoPac, and the proposed collective vote as a violation of the Class B stockholders' separate class voting rights.

(e) The separate class voting rights of the Class B stockholders were upheld by the district court. Slayton, et al. v. Missouri Pacific Railroad Company, et al., 233 F.Supp. 747 (E.D. Mo. 1964).

(f) The Court of Appeals for the Eighth Circuit unanimously reversed, ruling in favor of Mississippi, et al. 359 F.2d 106 (8th Cir. 1966).

(g) The Supreme Court of the United States granted certiorari. 385 U.S. 914 (1966). At the oral argument, one Justice said that the Plan "is one of the most notorious pieces of predatory finance I have seen -- and I have seen quite a few." Another Justice said of the Plan: "As I understand its operation, it could be no more unfair unless you just say they could take it all away from you."

(h) The Supreme Court unanimously reversed the judgment of the Court of Appeals for the Eighth Circuit. Levin v. Mississippi River Fuel Corporation, et al., 386 U.S. 162 (1967). The Supreme Court said that, with the equity of each Class A share limited to \$100 and the equity of each Class B share then about \$6,500, the Plan's proposed exchange of four new shares for each Class B share "is like exchanging four rabbits for one horse." 386 U.S. at 169.

(i) The Supreme Court did not remand to the Court of Appeals for the Eighth Circuit, but rather, after citing the requirements of "[e]ffective judicial administration", remanded to the district court. 386 U.S. at 170.

15. As a further part of said unlawful scheme, Mississippi and said directors have used their control and

domination of the affairs of MoPac to benefit Mississippi at the expense of MoPac and its Class B stockholders, and have repeatedly acted contrary to, and failed and refused to act in, the best interests of MoPac and all its stockholders, as hereinafter alleged.

16. (a) As part of said scheme, Mississippi and said directors have publicly denigrated the MoPac Class B stock.

(b) In 1961, William G. Marbury, then and until his death in 1971 Chairman of the Board and Chief Executive Officer of Mississippi and a director and Chairman of the Executive Committee of MoPac, told the MoPac stockholders at their annual meeting:

"[The Class B stock is] a class of stock that should never have been issued, in my opinion . . . It's like a bad eye or a deaf ear . . . I wish it weren't there."

(c) In 1961, when the MoPac Class B stock was selling over-the-counter for about \$400 a share, William G. Marbury stated for publication in The New York Times (October 29, 1961, p. F3):

"Anybody's crazy to pay it!"

and D. B. Jenks, then a director of Mississippi and President of MoPac, and now a director, President and Chief Executive Officer of Mississippi, and Chairman of the Board and Chief Executive Officer of MoPac, stated (id.):

"It isn't worth it!"

(d) In 1963, William G. Marbury stated for publication in a magazine with national circulation (Forbes, June 15, 1963, p. 25):

"[T]here are second-class stocks, and that's what the [MoPac Class] B is. That's why they call it the B. When we pay \$5 on the A, we'll also pay \$5 on the B. That's fair enough."

17. (a) In 1965, when Mississippi's outstanding stock consisted of about four million shares of common stock selling on the New York Stock Exchange at about \$40 per share, Mississippi doubled the number to eight million by a two-for-one stock split. William G. Marbury stated the following reasons for the stock split in a letter to the stockholders of Mississippi dated March 4, 1965:

"The Directors believe the change [split] will result in a broadening of public interest in the stock, an increase in the number of stockholders, and a greater availability of shares for purchase and sale; and that this will be in the best interests of the stockholders."

(b) Although there are only 39,731 outstanding shares of MoPac Class B stock, selling currently at about \$1,000. per share, the defendants have failed and refused to split the Class B stock or to take any other step that will result in a broadening of public interest in the stock, an increase in the number of stockholders, and a greater availability of shares for purchase and sale.

18. (a) MoPac's federal income taxes in the eight years 1964 through 1971 have averaged about \$3 million a year.

(b) MoPac's past, present, and future federal income taxes could have been, and could be, materially reduced by replacing MoPac Class A stock with debentures or other interest-bearing securities, since interest payments (unlike dividends) are deductible in computing the payor's federal taxable income.

(c) Mississippi, in computing its own federal taxable income, is allowed to deduct an amount equal to at least 85% of the amount of dividends it receives from MoPac on the MoPac Class A stock. Mississippi would not be allowed any similar or corresponding deduction with respect to interest payments it might receive from MoPac.

(d) Mississippi has wrongfully, and because of its conflicting self-interest, failed and refused to take, and to cause or permit MoPac to take, any step to reduce MoPac's federal income taxes by replacing MoPac Class A stock with interest-bearing securities. Such failure and refusal have caused and continue to cause a waste of MoPac's assets.

19. As a result of the foregoing and other wrongful acts and omissions by the defendants and said directors, the Class B stockholders have been severely damaged.

20. Plaintiff has no adequate remedy at law.

SECOND COUNT

21. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 19 (including subparagraphs) hereof, and further alleges that:

22. (a) In furtherance of the scheme to enrich Mississippi by depriving MoPac's Class B stockholders of their rightful share of MoPac's earnings and by destroying the Class B stockholders' valuable residual equity in MoPac,

(i) defendant Mississippi and its then chief executive officer, William G. Marbury ("Marbury"), entered into a conspiracy with the members of the Board of Directors of MoPac to cause the owners of MoPac Class B stock to surrender their shares for less than the true value thereof (as alleged, inter alia, in paragraph 14 hereof), and

(ii) the defendants, pursuant to said conspiracy, attempted to depress the market value of the MoPac Class B stock by, inter alia, limiting the level of dividends on the Class B stock to \$5 per share per year, publicly denigrating the value of the Class B stock, failing to split the Class B stock, and failing to reduce MoPac's federal income taxes, all as hereinabove alleged.

(b) In furtherance of the conspiracy to cause the owners of MoPac Class B stock to surrender their shares for less than the true value thereof, the defendants, together with Harbury and the Boards of Directors of MoPac and Mississippi, by means of interstate commerce, the mails, and the facilities of national securities exchanges, have engaged in a continuous course of manipulative and deceptive conduct. This conduct includes, *inter alia*, the making of untrue statements of material fact, and omissions to state material facts necessary in order to render statements made by them not misleading. This course of conduct has operated as a fraud and deceit upon the plaintiff and the Class B stockholders represented by her, and upon those members of the investing public at large who bought and sold shares of MoPac Classes A and B stock during that period. This conduct commenced prior to 1963 and continues to the present.

23. As part of said course of manipulative and deceptive conduct, the defendants and their aforesaid co-conspirators performed each of the acts described in paragraphs 11, 14, and 16 through 18 hereof. In addition:

24. The defendants and their aforesaid co-conspirators have caused to be distributed to the stockholders of MoPac, through the mails and in interstate commerce, annual reports, and various other writings and communications, containing false and misleading statements of material facts, and omissions of material facts, including the following:

(a) a statement that MoPac's plan of consolidation referred to in paragraph 14 hereof would produce economies of operation, when defendants knew full well that no substantial economies of operation could be realized from the plan;

✓ (b) failure to disclose that the true motive of defendants and of all the directors of MoPac, in proposing said plan, was to appropriate almost 98% of the equity of the Class B stockholders to the Class A stock;

(c) statements showing annual per-share earnings for the Class A stock as \$6.72 in 1961, \$12.07 in 1962, \$13.34 in 1963, \$13.66 in 1964, \$14.26 in 1965 and \$14.43 in 1966 (as shown in Exhibit D hereto), whereas in fact, as found by the United States Supreme Court and as specified in MoPac's charter and as defendants and their aforesaid co-conspirators well knew, the Class A stock was and is limited to a maximum dividend right of \$5 per year as and if declared, and has no equity rights whatsoever beyond the stated value of \$100 per share, amounting in total to approximately \$185,000,000 for all Class A shares, which amount was more than covered by the surplus account of MoPac during the aforesaid years;

✓ (d) failure, during the same years aforesaid in subparagraph (c) above, to state any earnings per share whatsoever for the Class B stock, which is the sole stock entitled to share in the residual equity of MoPac, clearly including all annual earnings over and above \$5 per share of Class A stock;

✓ (e) failure, for the years 1967 to the present, to report any per-share earnings whatsoever for any of MoPac's stocks, despite the opinion of the Accounting Principles Board that such information is highly significant to investors and should be prominently reported in financial statements;

(f) failure to report to MoPac's stockholders and the investing public that the reason for MoPac's discontinuance of its past practice of reporting earnings per share of Class A stock by attributing all earnings to the Class A and none to the Class B was that the Securities and Exchange Commission had informed MoPac that such reporting was incorrect and improper.

25. Had the earnings figures referred to in subparagraphs (c) and (d) of paragraph 24 above been correctly and honestly stated, they would have shown the following earnings per share of Class B stock for each of the years 1961 through 1966: \$80.50 in 1961, \$328 in 1962, \$395 in 1963, \$458 in 1964, \$428 in 1965, and \$474 in 1966.

26. The foregoing conduct was part of a plan and conspiracy conceived and carried out by defendants and their co-conspirators to create an impression in the minds of the MoPac Class B shareholders and the investing public at large, by means of misreporting earnings and withholding dividends and otherwise, that the Class B stock was far less valuable than was the fact, in order thereby to drive down the market price of the Class B and enable defendants to force its surrender, purchase it, and destroy the Class B shareholders' equity in MoPac and acquire the value of said equity for Mississippi and the other Class A shareholders of MoPac.

27. During the period of said conspiracy, defendants Mississippi and T. C. Davis bought and sold shares of MoPac Class B stock.

28. During the period of said conspiracy, Alleghany and others made purchases of MoPac Class B stock.

29. The aforesaid conduct of defendants and their co-conspirators was and is in violation of state and federal statutes (including Section 10(b) of the Securities Exchange Act of 1934) and their common-law fiduciary duty.

WHEREFORE, plaintiff demands judgment that:

(1) The Board of Directors of MoPac be ordered to declare, and MoPac be ordered to pay, dividends on the MoPac Class B stock, in such amounts as the Court shall determine to be just and reasonable, for the year 1964 (including for such year dividends from retained income accumulated by MoPac in the

1971, with interest thereon from the time when such dividends should have been paid; or, in the alternative, awarding plaintiff and all members of the class represented by her damages against each of the defendants in the amount of the injury suffered by them during the years 1964 through 1971 as measured by the amount of reasonable dividends withheld by defendants pursuant to the fraudulent scheme complained of herein, with interest thereon from the time when such dividends should have been paid;

(2) Mississippi and the Board of Directors of MoPac be enjoined from the illegal, oppressive, and arbitrary use of their power to withhold dividends on the MoPac Class B stock, and be required to cause to be declared and paid adequate dividends on said stock in the future;

(3) Plaintiff be awarded the costs, expenses, and reasonable counsel fees of this action, and defendant MoPac be reimbursed by Mississippi and the individual defendants for all such amounts paid by MoPac;

(4) This Court retain jurisdiction of this matter for such period of time as the Court may deem reasonable to obtain compliance with its judgment; and

(5) Plaintiff be granted such other and further relief as may be just.

ORANS, ELSEN & POLSTEIN

By: John S. Orans
A Member of the Firm
One Rockefeller Plaza
New York, New York 10020
JU 6-2211

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF MIDDLESEX, ss

Betty Levin, being duly sworn, deposes and says that she is the Plaintiff in the within action; that she has read the foregoing amended complaint and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

Betty Levin
Betty Levin

Subscribed and sworn to before me July 24, 1972.

Alvin Levin

Alvin Levin, Notary Public
My Commission Expires
October 18, 1974.

ATTACHMENT C
[CONFORMED COPY]

SETTLEMENT AGREEMENT

THIS AGREEMENT, dated as of December 18, 1972, by and between ALLEGHENY CORPORATION ("Alleghany"), a Maryland corporation, MISSOURI PACIFIC RAILROAD COMPANY ("MoPac"), a Missouri corporation, and MISSISSIPPI RIVER CORPORATION ("MRC"), a Delaware corporation.

WITNESSETH:

WHEREAS, Alleghany, Betty Levin ("Levin") and Robert LeVasseur ("LeVasseur") (collectively, "Plaintiffs"), all of whom are Class B stockholders of MoPac, are maintaining, in the United States District Court for the Southern District of New York ("the Court"), an action ("the Action") entitled *Levin, et al. v. Mississippi River Corporation, et al.*, 67 Civ. 5095 (EW), against MoPac and MRC, and also against Robert H. Craft, T. C. Davis and Thomas F. Milbank, who are directors of MoPac and/or MRC, (collectively, "Defendants"); and

WHEREAS, Alleghany, Levin and LeVasseur are maintaining the Action on behalf of themselves and all other Class B stockholders of MoPac, and Levin and LeVasseur are also maintaining the Action derivatively on behalf of MoPac; and

WHEREAS, Defendants deny the material allegations made against them in the Action and assert that the claims alleged by Plaintiffs therein are without merit and are barred in whole or in part by affirmative defenses; and

WHEREAS, the parties hereto are convinced that the recapitalization of MoPac is desirable to promote the welfare of MoPac and all of its stockholders and to remove friction between different classes of its stockholders; and

WHEREAS, in order to put to rest the controversy between Plaintiffs, and all other stockholders of MoPac on whose behalf the Action was brought, and Defendants, and to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation, the parties hereto desire to settle and compromise the Action and all claims asserted therein; and

WHEREAS, Alleghany beneficially owns 21,243 shares, or approximately 53 percent, of the 39,731 shares outstanding of Class B stock of MoPac, and MRC beneficially owns 1,158,395 shares, or approximately 62 percent, of the 1,864,052 shares outstanding of Class A stock of MoPac; and

WHEREAS, pursuant to order of the Interstate Commerce Commission, the Class B stock beneficially owned by Alleghany is held by Franklin National Bank ("Franklin") as voting trustee, and is held of record either by Franklin or by a nominee or nominees thereof;

Now, THEREFORE, in consideration of the premises and of the mutual covenants hereinafter set forth, the parties hereto agree as follows:

1. RECAPITALIZATION, TENDER OFFER AND DISMISSAL OF THE ACTION.

1.1. *Recapitalization.* As promptly as practicable after approval by the Court of the terms of settlement contained herein, and after clearance, if necessary, of proxy materials by the Securities and Exchange Commission (which clearance MoPac will use its best efforts to obtain as promptly as practicable after such approval by the Court), MoPac shall cause a meeting of its stockholders to be duly held, at which it shall submit to such stockholders for their approval, pursuant to the applicable laws of the State of

Missouri and pursuant to the requirements for such approval set forth in Section 5.1(a) hereof: (a) the Plan of Recapitalization (the "Plan of Recapitalization") annexed hereto as Exhibit A [Attachment A to the Proxy Statement] and (b) an amendment (the "Amendment") to MoPac's Articles of Association in the form annexed to the Plan of Recapitalization. The Plan of Recapitalization provides for the recapitalization of MoPac on the following terms:

(a) The creation of a new class of 2,000,000 shares of \$5 Cumulative Preferred Stock, without par value, ("Preferred Stock"), each such share to be entitled to one vote, to a dividend preference of \$5 per annum, and to a preference of \$100 in the event of the liquidation, dissolution or winding-up of MoPac, and each such share to be convertible, at the option of the holder, into one share of Common Stock (as defined in (b) below) at any time after one year following a final and effective order of the Interstate Commerce Commission (as defined in Section 5.1(b) hereof) authorizing the issuance of the Preferred Stock and the Common Stock, and to be redeemable, at the option of the Company, for \$100 at any time after December 31, 1975; and the conversion of each share of MoPac Class A Stock outstanding on the "Effective Date" (as defined in Section 1.4 hereof) into one share of Preferred Stock.

(b) The creation of a new class of 3,000,000 shares of Common Stock, without par value, ("Common Stock"), each such share to be entitled to the rights set forth in the Amendment; and the conversion of each share of MoPac Class B Stock outstanding on the Effective Date into 16 shares of Common Stock and \$850 in cash.

1.2. Tender Offer. For a period of 15 business days, inclusive, commencing on the first business day after the Determination Date (as defined in Section 1.4 hereof) and subject to the terms below provided, MRC shall offer to purchase, on the Effective Date, for \$100 per share, such shares of MoPac Common Stock as are tendered to MRC. If fewer than 400,000 such shares are tendered, MRC shall be obligated to purchase all of such shares so tendered. If 400,000 or more of such shares are so tendered, MRC shall be obligated to purchase 400,000 of such shares and may purchase, at its option, any additional shares so tendered. Should MRC elect to purchase less than all of the tendered shares, the shares purchased by MRC shall be purchased as nearly as may be *pro rata*, disregarding fractions, according to the number of shares tendered by each person tendering shares. Alleghany agrees that all shares of Common Stock issuable on the Effective Date in exchange for shares of Class B Stock beneficially owned by Alleghany will be tendered to MRC. MRC shall notify Alleghany two days prior to the Effective Date of the number of Alleghany shares it will purchase.

1.3. Manner of Making Tenders. On the first business day after the Determination Date, MRC shall cause to be mailed (i) to each record owner of MoPac Class B Stock at the close of business on the Determination Date, other than record owners of Class B Stock beneficially owned only by Alleghany, and (ii) to Alleghany, a form or forms, approved by the Court, which shall (A) contain the tender offer by MRC provided for in Section 1.2 hereof and (B) provide appropriate means for such record owners and Alleghany to indicate how many, if any, of the shares of Common Stock issuable thereto (or in the case of Alleghany, issuable to Franklin or its nominees) on the Effective Date are to be tendered to MRC. Such forms shall contain the name and address of an exchange agent to be selected by MoPac ("Exchange Agent") to whom such forms shall be returnable. An election to tender shares of Common Stock to MRC shall be effected by the delivery to the Exchange Agent no later than the close of business on the last day of the tender offer, of forms appropriately filled out to reflect such tender, duly executed by the record owner making the same or by Alleghany, accompanied by certificates, duly tendered, representing all of the shares of Class B Stock owned of record by such record owner.

1.4. Determination Date and Effective Date. The Determination Date shall be the third business day after the last of the conditions contained in Sections 5.1 and 5.5 hereof has been fulfilled. The Effective Date shall be the fifth business day following the completion of the tender offer described in Section 1.2.

1.5. *Dismissal of the Action.* Subject to Sections 7.9 and 7.10 hereof, order and judgment dismissing the Action as to all Defendants with prejudice, and without costs to any party except as contemplated by this Agreement, may be entered by the Court as soon as possible after the approval by the Court of the terms of this Agreement.

2. WARRANTIES AND REPRESENTATIONS OF MoPAC.

MoPac hereby warrants and represents, for the benefit of Plaintiffs and all other persons who are stockholders of MoPac (a) as of the date of this Agreement or (b) as of the Effective Date, as follows:

2.1. *Authority.* This Agreement has been duly authorized, executed and delivered by MoPac and constitutes a binding agreement of MoPac; and, subject only to approval by the Court of the terms of this Agreement, and to fulfillment of the conditions contained in Sections 5.1(a) and 5.1(b) hereof, MoPac has full power and authority to consummate the transactions contemplated hereby.

2.2. *Due Issuance.* The shares of MoPac Preferred Stock and Common Stock to be issued pursuant to the Plan of Recapitalization, when so issued, will have been validly authorized and issued by MoPac and will be fully paid and non-assessable.

2.3. *No Inconsistent Agreements.* Neither the execution of this Agreement, the issuance of MoPac Preferred Stock and Common Stock pursuant to the Plan of Recapitalization, nor any of the other transactions contemplated by this Agreement, has resulted or will result in a breach of any of the terms or provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument to which MoPac is a party or by which MoPac or property thereof is bound.

2.4. *Dividends.* The Board of Directors of MoPac anticipates that subject to business conditions and the financial position and results of operations of MoPac it will be in a position to authorize the payment of an annual dividend of at least \$5.00 per share on the presently outstanding Class B Stock, and the payment of quarterly dividends of \$1.25 per share on the Preferred Stock and at least \$1.25 per share quarterly on the Common Stock of MoPac following the tender offer, recapitalization and dismissal of the Action which are the subject of this Agreement.

2.5. *Other Negotiations.* MoPac was not engaged as of October 11, 1972, directly or indirectly, in any substantial negotiations or discussions with respect to any transaction (other than as provided for herein) involving a recapitalization, reorganization, merger, consolidation or sale of substantially all of the assets of MoPac.

2.6. *Compliance with Laws.* All acts to be performed by MoPac pursuant to this Agreement will be performed by it in full compliance with all material federal, state and local statutes, rules, regulations and other laws.

3. WARRANTIES AND REPRESENTATIONS OF MRC.

MRC hereby warrants and represents, for the benefit of MoPac, Plaintiffs, and all other persons who are stockholders of MoPac (a) as of the date of this Agreement or (b) as of the Effective Date, as follows:

3.1. *Authority.* This Agreement has been duly authorized, executed and delivered by MRC and constitutes a binding agreement of MRC; and, subject only to approval by the Court of the terms of this Agreement and to fulfillment of the conditions contained in Section 5.1 hereof, MRC has full power and authority to consummate the transactions contemplated hereby.

3.2 No Inconsistent Agreements. Neither the execution of this Agreement nor any of the transactions contemplated hereby has resulted or will result in a breach of any of the terms or provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument to which MRC is a party or by which MRC or property thereof is bound.

3.3. Financing Commitments. MRC has obtained, on terms satisfactory to it, a valid and binding bank loan commitment letter in an amount sufficient to permit it to consummate the tender offer and purchase of shares contemplated by Section 1.2 hereof, and has furnished counsel for Plaintiffs with true copies of such commitment letter. The warranties and representations made by MRC in such commitment letter are true and correct.

3.4. Other Negotiations. MRC was not engaged as of October 11, 1972, directly or indirectly, in any substantial negotiations or discussions with respect to any transaction (other than as provided for herein) involving a recapitalization, merger, consolidation or sale of substantially all of the assets of MoPac, or any sale or other disposition of MoPac stock owned or to be owned by MRC.

3.5. Compliance with Laws. All acts to be performed by MRC pursuant to this Agreement will be performed by it in full compliance with all material federal, state and local statutes, rules, regulations and other laws.

4. WARRANTIES AND REPRESENTATIONS OF ALLEGHANY.

Alleghany hereby warrants and represents to Defendants as follows:

4.1. Number of Class A and Class B Shares Owned. Alleghany is the beneficial owner of 21,243 shares of presently outstanding Class B Stock of MoPac and is the beneficial owner of 2,200 shares of presently outstanding Class A Stock of MoPac.

4.2. Authority. This Agreement has been duly authorized, executed and delivered by Alleghany, and constitutes a binding agreement of Alleghany; and, subject only to approval by the Court of the terms of this Agreement and to fulfillment of the conditions contained in Section 5.1 hereof, Alleghany has full power and authority to consummate the transactions contemplated hereby.

4.3. No Inconsistent Agreements. Neither the execution of this Agreement nor any of the transactions contemplated hereby has resulted or will result in a breach of any of the terms or provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument to which Alleghany is a party or by which Alleghany or property thereof is bound.

4.4. Compliance with Laws. All acts to be performed by Alleghany pursuant to this Agreement will be performed by it in full compliance with all material federal, state and local statutes, rules, regulations and other laws.

5. CONDITIONS TO THE OBLIGATIONS OF THE PARTIES.

5.1. The obligations of the parties under Sections 1.2, 1.3 and 6.1 hereof are subject to the fulfillment of the following conditions:

(a) *Approval by MoPac Stockholders.* The Amendment and Plan of Recapitalization shall have been approved by vote of 75% of the outstanding shares of Class A Stock including a majority of the outstanding shares of Class A Stock voted by holders of Class A Stock other than MRC and Alleghany (or Franklin or its nominees, as the case may be), and 75% of the outstanding shares of

Class B Stock including a majority of the outstanding shares of Class B Stock voted by holders of Class B Stock other than MRC and Alleghany (or Franklin or its nominees, as the case may be).

(b) *I.C.C. Matters.* The Interstate Commerce Commission shall have issued a final and effective order authorizing, without conditions or modifications, or on conditions or modifications acceptable to the parties and approved by the Court and the stockholders of MoPac (if in the opinion of MoPac such stockholder approval is required), (i) the issuance of the MoPac Preferred Stock and Common Stock pursuant to the Plan of Recapitalization, and (ii) any other matters concerning which MoPac deems it necessary to have Interstate Commerce Commission approval.

(c) *S.E.C. Matters.* (i) Either the Securities and Exchange Commission shall have issued an order, pursuant to Section 12(h) of the Securities Exchange Act of 1934, as amended ("the Exchange Act"), satisfactory to Alleghany and its counsel, Messrs. Donovan Leisure Newton & Irvine, exempting Alleghany from Section 16(b) of the Exchange Act to the extent of its participation in the transactions contemplated by this Agreement, or Alleghany shall have received from such counsel an opinion, satisfactory to Alleghany in form and substance, to the effect that Alleghany will not incur any liability under Section 16(b) of the Exchange Act in connection with the transactions contemplated by this Agreement;

(ii) Alleghany shall have obtained any necessary order from the Securities and Exchange Commission to exempt any of the acts to be performed by Alleghany pursuant to this Agreement which might be subject to the provisions of the Investment Company Act of 1940, as amended ("Investment Company Act"), or Alleghany and its counsel, Messrs. Donovan Leisure Newton & Irvine, shall have supplied Defendants and their respective counsel with an opinion of Alleghany's counsel, satisfactory to Defendants and their counsel in form and substance, to the effect that Alleghany would not be prohibited under the Investment Company Act from performing any of the acts to be performed by Alleghany pursuant to this Agreement.

(iii) Either the Securities and Exchange Commission shall have issued an order, pursuant to Section 12(h) of the Exchange Act, satisfactory to MRC and its counsel, Messrs. Dewey, Ballantine, Bushby, Palmer & Wood, exempting MRC from Section 16(b) of the Exchange Act to the extent of its participation in the transactions contemplated by this Agreement, or MRC shall have received from such counsel an opinion, satisfactory to MRC in form and substance, to the effect that MRC will not incur any liability under Section 16(b) of the Exchange Act in connection with the transactions contemplated by this Agreement.

(d) *MRC Financing.* MRC shall have available to it the necessary bank loans or other financing in amounts sufficient to permit MRC to consummate the tender offer and purchase of shares contemplated by Section 1.2 of this Agreement.

5.2. *Opinions of MoPac Counsel.* The right of MoPac to effectuate the Plan of Recapitalization and to cause the Amendment to become effective, and the obligation of Plaintiffs and MRC to convert their shares of MoPac stock pursuant thereto, are subject to the fulfillment of the following conditions:

(a) Plaintiffs and MRC shall have received from Messrs. Sullivan & Cromwell, counsel to MoPac, a written opinion, dated the Effective Date, to the effect that:

(i) This Agreement has been duly authorized, executed and delivered by MoPac and constitutes a binding agreement of MoPac; and MoPac has full power and authority to carry out the transactions contemplated hereby.

(ii) The shares of MoPac Preferred Stock and Common Stock into which the Class A Stock and Class B Stock are to be converted pursuant to the Plan of Recapitalization are validly authorized, issued and outstanding, and fully paid and nonassessable.

(iii) Either it is not necessary in connection with the conversion of Class A Stock into Preferred Stock and Class B Stock into Common Stock to register the Preferred Stock or Common Stock under the Securities Act of 1933, as amended, or a registration statement under such act is in effect with respect thereto.

(iv) All proceedings, consents or other authorizations or approvals of the Interstate Commerce Commission or of any other federal regulatory agency or federal governmental body required in connection with the consummation by MoPac of the transactions contemplated by this Agreement have been obtained and are in full force and effect.

In rendering its opinion hereunder, such counsel may rely, to the extent specified in its opinion, on factual information furnished by MoPac and on opinions rendered by local counsel.

(b) Plaintiffs and MRC shall have received from Messrs. Bryan, Cave, McPheeers & McRoberts, counsel to MoPac, a written opinion, dated the Effective Date, to the effect that:

(i) None of the transactions contemplated by this Agreement has resulted or will result in a breach of any of the terms and provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument, known to such counsel, to which MoPac is a party or by which MoPac or property thereof is bound.

(ii) All proceedings, orders, consents, or other authorizations or approvals of any state or local regulatory agency or other governmental body (other than in connection or as to compliance with provisions of the state securities or Blue Sky laws of any jurisdiction other than the State of Missouri) required in connection with the consummation by MoPac of the transactions contemplated by this Agreement have been obtained and are in full force and effect.

In rendering its opinion hereunder, such counsel may rely, to the extent specified in its opinion, on factual information furnished by MoPac and on opinions rendered by local counsel.

5.3. *Opinion of MRC Counsel.* The right of MRC to purchase shares of Common Stock tendered thereto pursuant to Sections 1.2 and 1.3 hereof, and the obligation of the holders of such shares to sell the same to MRC, are subject to the receipt by Plaintiffs from Messrs. Dewey, Ballantine, Bushby, Palmer & Wood, counsel to MRC, of a written opinion, dated the Effective Date, to the effect that:

(a) The Agreement has been duly authorized, executed and delivered by MRC and constitutes a binding agreement of MRC, and MRC has full power and authority to carry out the transactions contemplated hereby.

(b) None of the transactions contemplated hereby has resulted or will result in a breach of any of the terms and provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument, known to such counsel, to which MRC is a party or by which MRC or property thereof is bound.

(c) All proceedings, orders, consents, or other authorizations or approvals of any federal, state or local regulatory agency or other governmental body (other than in connection with or as to compliance with provisions of state securities or Blue Sky laws) required in connection with the consummation by MRC of the transactions contemplated by this Agreement have been obtained and are in full force and effect.

In rendering its opinion hereunder, such counsel may rely, to the extent specified in its opinion, on factual information furnished by MRC, and on opinions rendered by local counsel.

5.4. *Opinion of Alleghany Counsel.* The obligations of MoPac and MRC to consummate the Plan of Recapitalization and tender offer as provided in Section 6.1 hereof are subject to the receipt thereby

of a written opinion, dated the Effective Date, from Messrs. Donovan Leisure Newton & Irvine, counsel to Alleghany, to the effect that:

- (a) This Agreement has been duly authorized, executed and delivered by Alleghany and constitutes a binding Agreement of Alleghany; and Alleghany has full power and authority to carry out the transactions contemplated hereby.
- (b) None of the transactions contemplated hereby has resulted or will result in a breach of any of the terms and provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument, known to such counsel, to which Alleghany is a party or by which Alleghany or property thereof is bound.
- (c) All proceedings, orders, consents, or other authorizations or approvals of any federal, state or local regulatory agency or other governmental body (other than in connection or as to compliance with provisions of the state securities or Blue Sky laws of any jurisdiction) required in connection with the consummation by Alleghany of the transactions contemplated by this Agreement have been obtained and are in full force and effect.

In rendering its opinion hereunder, such counsel may rely, to the extent specified in its opinion, on factual information furnished by Alleghany, and on opinions rendered by local counsel.

5.5. Court Approval. This settlement is subject to approval by the Court pursuant to Rules 23(e) and 23.1 of the Federal Rules of Civil Procedure (including any necessary approval of any change, amendment or modification of the terms hereof).

6. CLOSING.

6.1. *Action to be Taken at Closing.*

- (a) A Closing under this Agreement will be held at 10:00 a.m., local time, on the Effective Date, at the offices of MoPac, 210 North 13th Street, St. Louis, Missouri, or such other place as may be mutually agreed upon by the parties hereto.
- (b) The obligations of each of the parties hereto under this Section 6.1 are subject to performance of all of the actions to be performed pursuant to such section.
- (c) The following action will be taken at the Closing:
 - (1) MoPac will cause the Amendment to be deposited with a custodian to be selected by the parties hereto (the "Custodian") for filing pursuant to Missouri law.
 - (2) The opinions of counsel referred to in Sections 5.2, 5.3 and 5.4 hereof will be deposited with the Custodian for delivery to the appropriate recipients.
 - (3) MoPac will deposit with the Custodian for delivery to an Exchange Agent the certificates representing the shares of Preferred Stock issuable to the former Class A stockholders pursuant to the Plan of Recapitalization.
 - (4) MoPac will deposit with the Custodian for delivery to an Exchange Agent certified or bank checks in the aggregate amount of the cash payable to the former Class B Stockholders pursuant to the Plan of Recapitalization and the certificates representing the shares of Common Stock issuable to the former Class B stockholders pursuant to the Plan of Recapitalization.
 - (5) MRC will deposit with the Custodian for delivery to an Exchange Agent certified or bank checks in the aggregate amount of the purchase price for the shares of Common Stock tendered to MRC by the former Class B stockholders and purchased by MRC.

(6) MoPac and MRC will deliver to the Custodian for delivery to Plaintiffs certified or bank checks in the aggregate amount of the allowances of fees and expenses, if any, referred to in Section 7.10 hereof.

(7) Immediately upon completion of all action specified in Section 6.1(c)(1) through (6), the Custodian will file the Amendment with the proper authorities and simultaneously deliver the opinions and cause the Amendment to become effective under Missouri law. Thereupon, the instruments and securities specified in Section 6.1(c)(3), (4), (5) and (6) shall be held by the Custodian for, and shall be immediately deliverable to, the respective parties entitled thereto, as hereinafter provided.

(8) The Custodian will immediately deliver to the Exchange Agent the items mentioned in Section 6.1(c)(3), (4), and (5).

(9) The Exchange Agent will, (i) immediately pay and deliver to the former holders of shares of Class B Stock the certificates for which were duly tendered as provided in Section 1.3 or are duly tendered to MRC at the Closing, the cash and the certificates representing the Common Stock into which such shares have been converted (less any shares purchased by MRC and plus the cash paid by MRC for such shares purchased) pursuant to the Plan of Recapitalization; (ii) immediately deliver to MRC the certificates representing the shares of Common Stock purchased by it; (iii) hold as agent for each holder of former Class A shares the certificates representing the Preferred Stock into which such shares have been converted pursuant to the Plan of Recapitalization, for delivery upon surrender of certificates representing such former Class A shares; and (iv) hold as agent for each holder of former Class B shares represented by certificates not duly tendered to the Exchange Agent as provided in Section 1.3 or to MRC at the Closing, the cash and the certificates representing the Common Stock into which such shares have been converted pursuant to the Plan of Recapitalization, for payment and delivery upon surrender of certificates for such former Class B shares.

(d) The Custodian will deliver to Plaintiff Alleghany and to counsel for Plaintiffs Levin and LeVasseur, Messrs. Orans, Elsen & Polstein, and Messrs. Pomerantz, Levy, Haudek & Block, respectively, certified or bank checks for the allowances of fees and expenses referred to in Section 7.10 hereof, or, if such fees have not been awarded by the time of the Closing, the Defendants shall pay such fees and allowances to the persons and firms named above immediately after such award has become final.

7. FURTHER AGREEMENTS OF THE PARTIES.

7.1. *Submission to the Court.* The parties will use their best efforts to obtain the Court's approval of the terms of settlement contained in this Agreement. Without limiting the foregoing, as promptly as possible after the date of this Agreement the parties hereto will submit to the Court, for its approval after notice to MoPac stockholders as required by Rules 23(e) and 23.1 of the Federal Rules of Civil Procedure, the terms of settlement contained in this Agreement, and will also submit to the Court a proposed form of notice to such stockholders. All expenses of printing and mailing such notice will be borne jointly by MoPac and MRC.

7.2. *Stockholder Approval.* MoPac will use its best efforts to bring about the fulfillment of the condition contained in Section 5.1(a) hereof. Alleghany will use its best efforts to cause the shares of MoPac stock beneficially owned by it to be voted in favor of the Plan of Recapitalization and the Amendment. MRC will cause all shares of MoPac stock owned by it, beneficially or of record, to be voted in favor of the Plan of Recapitalization and the Amendment. MRC and Alleghany agree that, prior to the day following the Effective Date, they will not dispose of any shares of MoPac stock owned by them as of the date hereof beneficially or of record, other than pursuant to the Plan of Recapitalization and tender offer provided for herein.

7.3. *I.C.C. Application.* MoPac will file with the Interstate Commerce Commission an application for the order referred to in Section 5.1(b) hereof, and MoPac will use its best efforts to obtain such order as promptly as possible, and to bring about the fulfillment of the condition contained in Section 5.1(b) hereof.

7.4. *Non-Severability of Recapitalization and Tender Offer.* The Plan of Recapitalization annexed hereto and the tender offer referred to in Section 1.2 hereof are mutually interdependent obligations.

7.5. *Limitation on Other Purchases.* MoPac and MRC agree that neither they, their subsidiaries nor any person acting on their behalf shall purchase any shares of MoPac Preferred Stock or Common Stock for a price in excess of \$100 per share for a period of six months after the Effective Date.

7.6. *Further Limitation on Purchases.* Alleghany agrees that neither it nor any person acting in its behalf shall purchase any shares of MoPac Preferred Stock or Common Stock or MRC capital stock for a period of three years after the Effective Date.

7.7. *Termination.* In the event that the Closing contemplated by Section 6.1 of this Agreement does not take place on or before December 31, 1973, this Agreement may be terminated at the option of Alleghany, MoPac or MRC, by written notice to all of the parties hereto. Any termination under this Section 7.7 shall be without prejudice to any rights or remedies that any party may possess at the date of such termination by reason of any breach of this Agreement by any other party prior to such date.

7.8. *Limitations on Litigation.* By approval of this Agreement, Plaintiffs and Defendants and all members of the class represented by Plaintiffs are deemed to agree that nothing incident or relating to the subject matter of this Agreement, oral or written, including but not limited to negotiations and public announcements, may be used by any such party or class member against any other party or class member in the Action or in any other action, other than one to enforce rights and obligations created by or arising out of this Agreement. This limitation shall survive the termination of this Agreement.

7.9. *Retention of Jurisdiction by Court.* Upon the entry of the judgment referred to in Section 1.5 hereof, the Court shall nevertheless retain jurisdiction of the matter to supervise the consummation of the settlement and for the purpose of awarding the fees and allowances referred to in Section 7.10. If the settlement is not consummated, any party may move to reopen the judgment and no party shall oppose such application.

7.10. *Fees of Counsel.* After the entry of a final judgment by the Court approving the terms of settlement contained herein, and after such final judgment is no longer subject to appeal, Plaintiffs and/or counsel will apply to the Court for allowances of fees and expenses, including fees and disbursements of attorneys, accountants and experts; and Defendants will not oppose the granting of such allowances as in their judgment are reasonable. Any such allowances shall be paid by MoPac and MRC.

7.11. *Waiver of Future Actions.* Each named Plaintiff in the Action and any member of a class represented by a named Plaintiff in the Action, by approval of this Agreement, is deemed to waive any objection to the propriety of the representation contained in Section 2.4 hereof, and to the reasonableness of the dividends declared by MoPac for any period between the date of this Agreement and the Effective Date if declared as contemplated in Section 2.4 hereof.

7.12. *Cooperation in Effecting Settlement.* The parties agree that they and their respective counsel will cooperate and consult with one another fully, in preparing for and consummating the transactions contemplated by this Agreement.

7.13. *Best Efforts.* MoPac, MRC and Alleghany will use their respective best efforts to procure and cause to be delivered to the other parties, as contemplated by this Agreement, the opinions of their

respective counsel referred to in Sections 5.2, 5.3, and 5.4 hereof (including the use of their respective best efforts seasonably to obtain or bring about all such proceedings, consents, or other authorizations, approvals or actions as may be required to form the basis of such opinions). Alleghany and MRC will use their respective best efforts to bring about the fulfillment of the conditions contained in Section 5.1(c) hereof. MRC will use its best efforts to bring about the fulfillment of the conditions contained in Section 5.1(d) hereof.

7.14. *Exchange Listing.* Promptly after the Effective Date and for a period of five years thereafter, MoPac will use its best efforts to cause its Preferred Stock and Common Stock to be listed on the New York Stock Exchange, if during such time the Exchange's requirements for listing are met.

7.15. *Action to be Taken by Alleghany.* On the Determination Date or as promptly thereafter as possible, Alleghany will advise MoPac as to the name of each person who on such date held of record shares of Class B Stock beneficially owned by Alleghany, and as to the number of such shares so held by each such person.

7.16. *Survival.* The warranties, representations and other obligations contained in this Agreement shall survive the consummation of the transactions contemplated hereby, including the actions to be taken at the Closing hereunder.

7.17. *Entire Agreement.* This Agreement contains the entire agreement between the parties hereto with respect to the transactions contemplated hereby, and may not be modified or amended except by a writing duly executed by the party against whom the modification or amendment is asserted.

7.18. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed to constitute an original, but all of which together shall constitute the same agreement.

7.19. *Governing Law.* This Agreement shall be construed and applied according to the laws of the State of New York.

7.20. *Captions.* Captions are for reference only and do not constitute a part of this Agreement.

7.21. *Notices.* All notices hereunder shall be in writing and shall be deemed to have been duly given if personally delivered, telegraphed or mailed by certified mail as follows:

(a) If to Alleghany, to:

Mr. John J. Burns, Jr.
Alleghany Corporation
350 Park Avenue
New York, N. Y. 10022

copy to:

John E. Tobin, Esq.
Donovan Leisure Newton & Irvine
2 Wall Street
New York, N. Y. 10005

(b) If to MoPac, to:

Mark M. Hennelly, Esq.
Missouri Pacific Railroad Company
210 North 13th Street
St. Louis, Missouri 63103

copy to:

David W. Peck, Esq.
Sullivan & Cromwell
48 Wall Street
New York, N. Y. 10005

(c) If to MRC, to:

Cleon L. Burt, Esq.
Mississippi River Corporation
9900 Clayton Road
St. Louis, Missouri 63124

copy to:

Everett L. Willis, Esq.
Dewey, Ballantine, Bushby, Palmer & Wood
140 Broadway
New York, N. Y. 10005

or to such different person or address as the parties hereto may designate by written notice.

IN WITNESS WHEREOF, each party has caused this Agreement to be duly executed as of the date first above written.

ALLEGHANY CORPORATION

By JOHN J. BURNS, JR.
Vice President—Finance

ATTEST:

JARED C. HORTON
Vice President and Secretary

MISSOURI PACIFIC RAILROAD COMPANY

By D. B. JENKS
Chairman of the Board

ATTEST:

G. P. STRELINGER
Assistant Secretary

MISSISSIPPI RIVER CORPORATION

By THOMAS H. O'LEARY
Executive Vice President

ATTEST:

T. M. ARMSTRONG
Secretary

Affidavit of Mailing

STATE OF NEW YORK

COUNTY OF *New York*

Gerard M. Carey, being duly sworn, deposes and says that he is the attorney for the appellants herein and that on the 4th day of October, 1974, he served a true copy of the within appellants *appendix to brief* upon the following attorneys by depositing in an official depository under the exclusive care and custody of the United States Post Office Department, within the State of New York, enclosed in a post-paid, properly-addressed envelope.

Gerard M. Carey

Gerard M. Carey

Sworn to before me this
4th day of October, 1974

Diana E. Farrell
Notary Public
DIANA E. FARRELL
NOTARY PUBLIC, State of New York
No. 24-451682
Qualified in Kings County 76
My Commission Expires March 30, 1976

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